

FCC FACT SHEET*

Partitioning, Disaggregation, and Leasing of Spectrum

Report and Order and Second Further Notice of Proposed Rulemaking – WT Docket No. 19-38

Background: The Report and Order and Second Further Notice of Proposed Rulemaking would build upon Congress’ goals in the MOBILE NOW Act to incentivize beneficial transactions for small carriers and rural interests. In particular, the Commission would take important steps towards closing the digital divide by establishing the Enhanced Competition Incentive Program (ECIP). The new program would encourage licensees to partition, disaggregate, or lease spectrum to small carriers and Tribal Nations and to an array of entities to provide services in rural areas. The Second Further Notice of Proposed Rulemaking would seek comment on whether to consider expanding ECIP eligibility, and whether to adopt alternative construction requirements for wireless radio licensees generally, including a safe harbor.

What the Report and Order would do:

- Adopt two types of ECIP qualifying transactions: Small carrier/Tribal Nations and Rural-focused
- Put in place qualifications for either prong of ECIP that the transaction must designate a minimum of 50% of the licensed spectrum from a Wireless Radio Services licensee to an unaffiliated eligible entity through any type of assignment or through a long-term leasing arrangement and that the transaction must meet specific minimum geographic thresholds
- Establish three primary ECIP benefits for qualifying transactions:
 - A five-year license term extension for the assignee and assignor in partitioning and disaggregation transactions, the lessor in qualifying spectrum leasing transactions, and the assignee in full license assignments
 - A one-year extension of construction benchmarks for all parties, where applicable
 - For those entering into rural-focused transactions, substitution of the assignee’s coverage of the ECIP qualifying geography in lieu of current construction requirements
- Adopt waste, fraud, and abuse protections as part of ECIP
- Reduce regulatory burdens by permitting reaggregation of geographic licenses, which is independent of ECIP

What the Second Further Notice of Proposed Rulemaking would do:

- Ask questions about whether the Commission should expand the small carrier/Tribal Nation prong to allow non-common carriers to be eligible for ECIP
- Seek comment on whether to adopt alternative construction requirements for services with less flexible metrics and on a “use or offer to share” safe harbor metric, both of which are independent of ECIP

* This document is being released as part of a “permit-but-disclose” proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in WT Docket No. 19-38, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs/>). Before filing, participants should familiarize themselves with the Commission’s *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. *See* 47 CFR § 1.1200 et seq.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Partitioning, Disaggregation, and
Leasing of Spectrum
WT Docket No. 19-38

REPORT AND ORDER AND SECOND FURTHER NOTICE OF PROPOSED RULEMAKING*

Adopted: []

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Comment Date: 30 days after Federal Register publication
Reply Comment Date: 60 days after Federal Register publication

By the Commission:

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I. INTRODUCTION

1. In this *Report and Order and Second Further Notice of Proposed Rulemaking*, we take further key steps towards closing the digital divide by establishing the Enhanced Competition Incentive Program (ECIP) for wireless services. In the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act (MOBILE NOW Act),¹ Congress directed the Commission to consider steps to increase the diversity of spectrum access and the availability of advanced telecommunications services in rural areas. In response to this Congressional direction, the program we adopt focuses on furthering these important goals. In particular, today’s action will foster increased spectrum access for small carriers and Tribal Nations to promote greater competition in the provision of wireless services, and will facilitate increased availability of advanced wireless services in rural areas.

2. To achieve these vital Commission goals, we modify our existing partitioning, disaggregation, and leasing rules to provide specific incentives for stakeholders to voluntarily participate by engaging in qualifying transactions that make spectrum available to these entities and in these areas. We believe that the creation of the program will facilitate new opportunities for small carriers and Tribal Nations to increase access to spectrum, and will result in greater competition and expanded wireless deployment in rural areas, bringing more advanced wireless service including 5G to underserved communities. In addition to the incentive program, we reduce regulatory and administrative burdens and provide for reaggregation of previously partitioned and disaggregated licenses up to the original license size, while adopting appropriate safeguards.

3. In the *Second Further Notice*, we seek comment on whether potential future expansion of the program could further the Congressional goals set out in the MOBILE NOW Act. We also propose a framework for creating alternatives to population-based performance requirements for a variety of wireless radio service stakeholders with communications plans and business models not specifically targeted towards providing commercial wireless service to subscribers. We seek specific comment on these proposals and a variety of alternatives to develop a robust record on the most efficient approach towards addressing this industry goal.

¹ Consolidated Appropriations Act, Pub. L. No. 115-141, Division P (RAY BAUM’S Act of 2018), Title VI (MOBILE NOW Act), § 601 et seq. (2018), codified at 47 U.S.C. §§ 1501-1512.

II. BACKGROUND

A. Existing Partitioning, Disaggregation, and Spectrum Leasing Rules

4. *Partitioning and Disaggregation.* The Commission first adopted rules permitting geographic partitioning, which is the assignment of a geographic portion of a geographic area licensee's licensed area, and spectrum disaggregation, which is the assignment of portions of blocks of a geographic area licensee's spectrum, for Broadband PCS licenses in 1996.² The Commission has since adopted partitioning and disaggregation rules on a service-by-service basis to provide licensees the "flexibility to determine the amount of spectrum they will occupy and the geographic area they will serve."³

5. The Commission's partitioning and disaggregation rules apply to all "Covered Geographic Licenses," which consist of specified "Wireless Radio Services" (WRS) for which the Commission has auctioned exclusive spectrum rights in defined geographic areas.⁴ The license term for a partitioned license area or disaggregated spectrum license is the remainder of the original licensee's license term.⁵ Parties to a geographic partitioning, a spectrum disaggregation, or a combination of both, have two options to satisfy service-specific performance requirements (i.e., construction and operation requirements).⁶ First, each party may certify that it will individually satisfy any service-specific performance requirements and, upon failure to do so, must individually face any service-specific performance penalties.⁷ Alternatively, both parties may agree to share responsibility for compliance with performance requirements, and both parties are subject to any service-specific penalties.⁸

6. *Spectrum Leasing.* In 2003, the Commission adopted the first comprehensive set of rules to allow WRS licensees to enter into a variety of spectrum leasing arrangements.⁹ In so doing, the Commission recognized the public interest benefits of permitting "additional spectrum users to gain ready access to spectrum," thus enabling the "provision of new and diverse services and applications to help meet the ever-changing needs of the public."¹⁰

7. The Commission's spectrum leasing rules apply to all "included services," as set forth in section 1.9005 of the Commission's rules and which include WRS where commercial or private licensees hold exclusive use rights.¹¹ A "spectrum leasing arrangement" is an arrangement between a licensed

² See *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees*, WT Docket No. 96-148, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831, para. 1 (1996).

³ *Id.* See, e.g., *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, WT Docket No. 12-70, Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102, 16194-96, paras. 244-53 (2012) (AWS-4); *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, WT Docket No. 06-150, 22 FCC Rcd 15289, 15381, 15355-58, paras. 178-88 (2007) (Lower 700 MHz); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, Second Report and Order, 12 FCC Rcd 19079, 19127-54, paras. 138-227 (1997) (800 MHz and 900 MHz SMR).

⁴ 47 CFR § 1.907 (Definitions).

⁵ *Id.* § 1.950(e).

⁶ *Id.* § 1.950(g).

⁷ *Id.*

⁸ *Id.*

⁹ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604 (2003).

¹⁰ *Id.* at 20619, para. 32.

¹¹ 47 CFR § 1.9005.

entity and a third-party entity in which the licensee (spectrum lessor) leases certain of its spectrum usage rights in the licensed spectrum to the third-party entity (spectrum lessee).¹² The arrangement may involve the leasing of any amount of licensed spectrum, in any geographic area or site encompassed by the license, for any period of time during the term of the license authorization. Commission rules provide for two different types of spectrum leasing arrangements: (1) spectrum manager leasing arrangements, in which the licensee/lessor retains *de facto* control of the licensed spectrum leased to the spectrum lessee;¹³ and (2) *de facto* transfer leasing arrangements, in which the lessee is primarily responsible for ensuring that its operations comply with the Communications Act and Commission policies and rules.¹⁴

8. Spectrum manager leasing arrangements generally do not require prior Commission approval; rather, such arrangements are subject to a requirement that the licensee/lessor must notify the Commission in advance of commencing operations.¹⁵ Although the licensee/lessor remains responsible for compliance with any construction and performance requirements applicable to the leased spectrum, the licensee/lessor may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of compliance with any such requirements.¹⁶

9. *De facto* transfer spectrum leasing arrangements can be either long-term (more than one year) or short-term (one year or less). In general, *de facto* transfer spectrum leasing arrangements are subject to the Commission's general approval procedures, under which the Commission must grant the application prior to the parties putting the proposed spectrum leasing arrangement into effect.¹⁷

B. Statutory Requirement

10. Section 616 of the MOBILE NOW Act required that, within a year of its enactment, the Commission initiate a rulemaking proceeding to assess whether to establish a program, or modify an existing program, under which a licensee that receives a license for exclusive use of spectrum in a specific geographic area under section 301 of the Communications Act of 1934 may partition or disaggregate the

¹² *Id.* § 1.9003.

¹³ *Id.* §§ 1.9010, 1.9020. A licensee/lessor is deemed to have *de facto* control over the leased spectrum if it satisfies two conditions: (i) the licensee/lessor retains responsibility for lessee compliance with Commission policy and rules; and (ii) the licensee/lessor retains responsibility for interactions with the Commission, including all filings required under the license authorization and applicable service rules directly related to the leased spectrum. *Id.* § 1.9010(b).

¹⁴ *Id.* § 1.9030(b).

¹⁵ *Id.* § 1.9020(e) (requiring 21 days advance notice for spectrum manager leasing arrangements greater than one year in length, or 10 days advance notice for arrangements of one year or less in length). The Commission reviews the notifications to ensure that all necessary technical and other information is correctly submitted, but the subject spectrum leasing arrangement may be implemented without waiting for such review, unless the parties to the spectrum manager leasing arrangement have requested on the form that the arrangement become effective upon Commission acceptance of the notification. Spectrum manager leasing applications require no prior public notice before the Commission may accept them.

¹⁶ 47 CFR § 1.9020(d)(5). We note that a licensee/lessor that enters into a long-term *de facto* transfer spectrum leasing arrangement may attribute to itself the buildout or performance activities of its spectrum lessee(s) for purposes of compliance with any such requirements; a licensee/lessor may not do so under a short-term *de facto* transfer spectrum leasing arrangement. See 47 CFR §§ 1.9030(d)(5), 1.9035(d)(3). See also *Promoting Efficient Use of Spectrum*, WT Docket No. 00-230, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, 20676, para. 177 (2003) (“[S]hort-term leasing arrangements are expressly designed to be temporary in nature, and therefore cannot be counted to establish that the licensee is meeting the purposes and policies underlying our buildout rules, including the goal of ensuring establishment of service in rural areas.”).

¹⁷ *Id.* §§ 1.9030(a), 1.9035(a). Both long-term and short-term *de facto* transfer spectrum leasing applications are subject to overnight processing under the Commission's immediate approval procedures if the filing meets certain conditions. *Id.* §§ 1.9030(e)(2) (immediate approval procedures), 1.9035(e) (certain conditions still must be met in order for a short-term *de facto* transfer lease to qualify for immediate processing).

license by sale or long-term lease in order to, *inter alia*, make unused spectrum available to an unaffiliated covered small carrier or an unaffiliated carrier to serve a rural area. Congress also provided the Commission the flexibility to proceed if it found that such a program would promote the availability of advanced telecommunications services in rural areas or spectrum availability for covered small carriers.¹⁸

11. Section 616 required the Commission to consider four questions in conducting an assessment of whether to establish a new program or modify an existing program to achieve the stated goals. First, would “reduced performance requirements with respect to the spectrum obtained through the program . . . facilitate deployment of advanced telecommunications services in areas covered by the program”?¹⁹ Second, “what conditions may be needed on transfers of spectrum under the program to allow covered small carriers that obtain spectrum under the program to build out the spectrum obtained under the program in a reasonable period of time”?²⁰ Third, “what incentives may be appropriate to encourage licensees to lease or sell spectrum, including (i) extending the term of a license . . . or (ii) modifying performance requirements of the license relating to the leased or sold spectrum”?²¹ And fourth, what is “the administrative feasibility” of those incentives and of “other incentives considered by the Commission that further the goals of [section 616]”?²²

12. Section 616 provided, however, that the Commission “may offer a licensee incentives or reduced performance requirements under this section only if the Commission finds that doing so would likely result in increased availability of advanced telecommunications services in a rural area.”²³ Additionally, section 616 directs that, “[i]f a party fails to meet any build out requirements set by the Commission for any spectrum sold or leased under this section, the right to the spectrum shall be forfeited to the Commission unless the Commission finds that there is good cause for the failure of the party.”²⁴

C. Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking

13. On March 15, 2019, the Commission released the *Notice* pursuant to the MOBILE NOW Act, which initiated this proceeding as directed by Congress to assess whether potential changes to the Commission’s partitioning, disaggregation, and leasing rules might provide spectrum access to covered small carriers or promote the availability of advanced telecommunications services in rural areas.²⁵ The *Notice* sought comment on the specific questions and considerations posed in the MOBILE NOW Act, but also sought comment on whether the Commission should consider applying any rule revisions to an expanded class of licensees beyond those Congress required it to consider.²⁶

14. On November 18, 2021, the Commission released a *Further Notice of Proposed Rulemaking* that built upon the concepts explored in the *Notice*, while also relying on our pre-existing authority under Title III of the Communications Act of 1934, as amended, to include Tribal Nations and

¹⁸ MOBILE NOW Act, § 616(b)(1), 47 U.S.C. § 1506(b)(1). Congress also defined “covered small carrier” and “rural area.” See MOBILE NOW Act, § 616(a)(1), (a)(2), 47 U.S.C. § 1506(a)(1), (a)(2). See also *infra*, para. 25.

¹⁹ MOBILE NOW Act, § 616(b)(2)(A), 47 U.S.C. § 1506(b)(2)(A).

²⁰ *Id.* § 616(b)(2)(B), 47 U.S.C. § 1506(b)(2)(B).

²¹ *Id.* § 616(b)(2)(C), 47 U.S.C. § 1506(b)(2)(C).

²² *Id.* § 616(b)(2)(D), 47 U.S.C. § 1506(b)(2)(D).

²³ *Id.* § 616(b)(4), 47 U.S.C. § 1506(b)(4).

²⁴ *Id.* § 616(b)(3), 47 U.S.C. § 1506(b)(3).

²⁵ *Partitioning, Disaggregation, and Leasing of Spectrum*, Notice of Proposed Rulemaking, WT Docket No. 19-38, 34 FCC Rcd 1758 (2019) (*Notice*).

²⁶ *Notice*, 34 FCC Rcd at 1764-65, para. 20.

other entities to enhance spectrum access and facilitate rural buildout in the public interest.²⁷ We proposed an enhanced competition incentive program focused on increasing spectrum access for small carriers and Tribal Nations and promoting the availability of advanced telecommunications services in rural areas by creating incentives for competition-enhancing transactions. We proposed a range of incentives to promote partitioning, disaggregation, and leasing, including extending license terms by five years, extending construction periods by one year, and creating alternate rural-focused construction requirements. Separate from the incentive program, we sought comment on potential alternatives to population-based performance requirements for a variety of stakeholders, and proposed permitting reaggregation of previously partitioned and disaggregated licenses up to the original license size. Finally, we sought comment on a number of other issues, such as whether and how we should factor the use of Open-RAN technologies into the program, methods of increasing digital inclusion, and the feasibility of implementing use or share models for opportunistic spectrum use, in order to develop a more complete record towards solutions that further Commission goals.

15. The Commission received 11 comments and 10 reply comments in response to the *FNPRM*, representing a wide variety of views on how best to achieve Congressional and Commission goals.²⁸ That record unanimously supports the stated goals of the proceeding and the establishment of a program with appropriate incentives. Many commenters recommended adjustments to the proposed ECIP structure to promote greater competition and expanded wireless deployment in rural areas to bring more advanced wireless service to underserved communities. As discussed below, today we establish a program to advance important Commission goals and to allow stakeholders to immediately reap program benefits. We clarify that today's adoption of certain proposals does not foreclose potential future action as described in the *Second Further Notice*.

III. DISCUSSION

A. Establishment of the Enhanced Competition Incentive Program

16. In this *Report and Order*, we establish the ECIP largely as proposed in the *FNPRM*, as an initial measure to facilitate competition and increase spectrum access and rural service through transactions that meet the qualifying requirements. We make certain modifications to our proposed approach, however, to provide further clarity regarding program participation, head off potential inequities, and also account for the proper scaling of transactions involving licenses with larger geographic areas. Specifically, we believe that the ECIP will facilitate competition-enhancing transactions resulting in increased spectrum access for small carriers and Tribal Nations and increased availability of advanced telecommunications services in rural areas. Moreover, the program represents a productive step towards achieving long-standing Commission goals and builds upon Congressional intent as reflected in the MOBILE NOW Act mandate to further facilitate and incentivize transactions that will provide public interest benefits.

17. Nearly all commenters supported the Congressional and Commission objectives in this

²⁷ *Partitioning, Disaggregation, and Leasing of Spectrum*, Further Notice of Proposed Rulemaking, WT Docket No. 19-38, FCC 21-120, _ FCC Rcd _ (2021) (*FNPRM*).

²⁸ See generally OptimEra, Inc. Comments, Information Technology and Innovation Foundation (ITIF) Comments, AST SpaceMobile, Inc. Comments, Open Technology Institute at New America and Public Knowledge (OTIPK) Comments, Enterprise Wireless Alliance (EWA) Comments, Rural Wireless Association, Inc. (RWA) Comments, Wireless Internet Service Providers Association (WISPA) Comments, CTIA Comments, Mavenir Systems, Inc. Comments, T-Mobile USA, Inc. (T-Mobile) Comments, Satellite Industry Association (SIA) Comments, United States Cellular Corporation (USCC) Reply Comments, Hughes Network Systems, LLC Reply Comments, NTCA – The Rural Broadband Association (NTCA) Reply Comments, National Wireless Communications Council (NWCC) Reply Comments, Utilities Technology Council (UTC) Reply Comments, NCTA – The Internet and Television Association (NCTA) Reply Comments, AT&T Services, Inc. (AT&T) Reply Comments, RWA Reply Comments, WISPA Reply Comments, and CTIA Reply Comments.

proceeding. One commenter noted that the proposed ECIP “was a concrete step toward promoting greater access to spectrum, particularly for small carriers, rural carriers and Tribal Nations.”²⁹ Other commenters agreed that the Commission should implement ECIP to “promote greater competition in and expanded access to advanced telecommunications services in rural areas and spectrum access by smaller carriers and Tribal Nations.”³⁰

B. Enhanced Competition Incentive Program Structure

18. After review of the record, we establish ECIP eligibility through participation in a transaction involving partitioning and/or disaggregation, leasing, or full assignment of spectrum that meets the qualification requirements discussed below (Qualifying Transaction). Under the program, any covered geographic licensee may offer spectrum to an unaffiliated eligible entity through a partition and/or disaggregation, and any covered geographic licensee eligible to lease in an “included service”³¹ may offer spectrum to an unaffiliated eligible entity through a long-term leasing arrangement. Covered geographic licensees consist of specified WRS for which the Commission has auctioned exclusive spectrum rights in defined geographic areas.³² To ensure that appropriate incentives and benefits are afforded consistently across a variety of transaction types, we expand upon the initially proposed program and permit a covered geographic licensee to assign its entire authorization. We address below in detail the eligibility of parties that seek to participate in ECIP transactions as spectrum recipients through either of two specific prongs.

19. We note that in the *FNPRM*, we proposed that all WRS licensees in “included services” would be permitted to lease spectrum and participate in ECIP. The MOBILE NOW Act, however, requires that we assess the administrative feasibility of adopting program features. After review of the record, we find it necessary to modify our proposed approach towards leasing eligibility for lessors to ensure that all ECIP participants can accept responsibility for program obligations and realize program benefits. Accordingly, we do not include all WRS licensees in “included services” as eligible lessors within ECIP, as many of the program obligations and benefits are inapplicable to site-based wireless licensees that are generally permitted to lease; we do, however, permit any covered geographic licensees in “included services” to participate as lessors in the ECIP program. Similarly, we exclude light-touch

²⁹ EWA Comments at 3.

³⁰ NCTA Reply Comments at 1-2, EWA Comments 1-2.

³¹ See 47 CFR § 1.9005.

³² 47 CFR § 1.907. Covered geographic licenses consist of the following services: 1.4 GHz Service (part 27, subpart I, of this chapter); 1.6 GHz Service (part 27, subpart J); 24 GHz Service and Digital Electronic Message Services (part 101, subpart G, of this chapter); 218-219 MHz Service (part 95, subpart F, of this chapter); 220-222 MHz Service, excluding public safety licenses (part 90, subpart T, of this chapter); 600 MHz Service (part 27, subpart N); 700 MHz Commercial Services (part 27, subparts F and H); 700 MHz Guard Band Service (part 27, subpart G); 800 MHz Specialized Mobile Radio Service (part 90, subpart S); 900 MHz Specialized Mobile Radio Service (part 90, subpart S); 900 MHz Broadband Service (part 27, subpart P); 3.45 GHz Service (part 27, subpart Q); 3.7 GHz Service (part 27, subpart O); Advanced Wireless Services (part 27, subparts K and L); Air-Ground Radiotelephone Service (Commercial Aviation) (part 22, subpart G, of this chapter); Broadband Personal Communications Service (part 24, subpart E, of this chapter); Broadband Radio Service (part 27, subpart M); Cellular Radiotelephone Service (part 22, subpart H); Citizens Broadband Radio Service (part 96, subpart C, of this chapter); Dedicated Short Range Communications Service, excluding public safety licenses (part 90, subpart M); Educational Broadband Service (part 27, subpart M); H Block Service (part 27, subpart K); Local Multipoint Distribution Service (part 101, subpart L); Multichannel Video Distribution and Data Service (part 101, subpart P); Multilateration Location and Monitoring Service (part 90, subpart M); Multiple Address Systems (EAs) (part 101, subpart O); Narrowband Personal Communications Service (part 24, subpart D); Paging and Radiotelephone Service (part 22, subpart E; part 90, subpart P); VHF Public Coast Stations, including Automated Maritime Telecommunications Systems (part 80, subpart J, of this chapter); Upper Microwave Flexible Use Service (part 30 of this chapter); and Wireless Communications Service (part 27, subpart D).

leasing spectrum manager leases of 3.5 GHz Priority Access Licenses (PALs) in the Citizens Band Radio Service, because we do not believe the light-touch leasing model allows for the level of Commission oversight necessary to practically administer ECIP and avoid potential waste, fraud, and abuse. We nonetheless permit prospective ECIP participants in the Citizens Band Radio Service to enter into *de facto* transfer leases or general 21-day notification spectrum manager leases for PALs in order to access spectrum and fully receive the program's benefits.³³

20. As specified in the MOBILE NOW Act, we require that each party to a Qualifying Transaction be unaffiliated. In the *FNPRM*, we sought comment on the possible application of the definition of affiliate set forth in the Commission's designated entity rules, as well as any alternatives; no party commented on this issue.³⁴ We find it in the public interest to apply the Commission's current definition of affiliate from our designated entity rules, which is a person holding an attributable interest in an applicant if such individual or entity directly or indirectly controls or has the power to control the applicant; or is directly or indirectly controlled by the applicant; or is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant; or has an "identity of interest" with the applicant.³⁵ We find this eligibility restriction necessary to meet the intent of Congress and ensure that the parties to a Qualifying Transaction, and therefore intended beneficiaries of ECIP benefits, are unaffiliated to prevent gaming of the program. As such, we require applicants to identify their affiliates as part of their ECIP application in a Qualifying Transaction.

21. As proposed in the *FNPRM*, today we build upon Congressional goals in the MOBILE NOW Act to incentivize beneficial transactions in the public interest. Specifically, we adopt two types of ECIP Qualifying Transactions: those that focus on small carriers and Tribal Nations gaining spectrum access to increase competition, in any location, whether urban, suburban or rural; and those that involve any interested party that commits to operating in, or providing service to, rural areas. In general, both assignments and leases will qualify for ECIP, if they satisfy the other program criteria.

³³ Some spectrum manager leases of these 3.5 GHz Priority Access Licenses (PALs) in the Citizen's Band Radio Service are governed by the Commission's "light-touch leasing" rules, a process that builds upon and incorporates our traditional spectrum manager leasing approval process. Lessees seeking to engage in light-touch leasing pre-certify with the FCC that they meet the non-lease-specific eligibility and qualification criteria for 3.5 GHz light-touch leasing. Rather than being approved for a lease by the Commission after an application is filed in the Universal Licensing System (ULS), light-touch leases are managed and monitored by a third-party automated frequency coordinator, known as a Spectrum Access System (SAS). The SAS administrator confirms the PALs and lessees meet the light-touch leasing criteria in their pre-certification filings and the lease-specific eligibility requirements. After SAS confirmation, the lessees may immediately begin exercising the leased spectrum usage rights under the light-touch leasing arrangements. On a daily basis, the SAS administrators provide the FCC with an electronic report of the light-touch leasing notifications. The light-touch leases appear on our regularly issued Accepted for Filing Public Notices. See 47 CFR §§ 1.9046, 96.32(c), 96.66; *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, GN Docket No. 12-354, Order on Reconsideration and Second Report and Order, 31 FCC Rcd 5011, 5068-74, paras. 204-23 (2016) (*2016 3.5 GHz Second R&O*); see also *Promoting Investment in the 3550-3700 MHz Band*, GN Docket No. 17-258, Report and Order, 33 FCC Rcd 10598 (2018). The light-touch leasing process substituted only the immediate processing procedure of spectrum management leases under section 1.9020(e)(2), allowing PAL licensees and lessees to enter into spectrum manager leases under the general 21-day notification procedure in section 1.9020(e)(1) with a notification to the SAS prior to operation pursuant to section 1.9046(c). See *2016 3.5 GHz Second R&O*, 31 FCC Rcd at 5071, para.213 & n.485 and 5074, para. 220. The Commission adopted the light-touch leasing approach because the procedures under which we normally process spectrum manager leases in other exclusive-use wireless bands would be impractical in many cases for PALs, given that a significant percentage of these light-touch leases may cover a short period of time or perhaps a single event. See 47 CFR §§ 1.9010, 1.9020(e)(1), 1.9030, 1.9035, 96.32(a).

³⁴ *FNPRM* at 8, para.17.

³⁵ See 47 CFR § 1.2110(c)(2), (5).

22. The *FNPRM* sought comment on whether we should permit full license assignments within the ECIP and, if so, how we should implement these types of transactions. Although many of the proposed ECIP benefits would be applicable to both parties to a transaction involving partition, disaggregation (or to the lessor, in the case of leasing arrangements), they would only be available to the assignee in a full license assignment scenario because the assignor would no longer be licensed for that spectrum after consummation of the assignment. Nevertheless, one commenter supported the inclusion in ECIP of full assignments³⁶ and no commenters opposed the proposal. We find it inequitable to bar these types of transactions from ECIP, particularly where transactions involving partitioning and/or disaggregation of the same license the parties might seek to fully assign would be eligible. To increase program flexibility, we therefore permit transactions for full assignments of covered geographic licenses where either of the below prongs are met. We also sought comment on whether the Commission's rules permitting the sharing of performance requirements in the partitioning and/or disaggregation context runs counter to the ECIP framework as proposed in the *FNPRM*.³⁷ We find that the program benefits, obligations and penalties cannot be applied equitably in a shared construction obligation scenario, and that it would not be administratively feasible to implement. Therefore, we preclude any license with an existing shared performance obligations from participation in the program, and we will not accept in the ECIP any application with an election from the parties to share performance obligations.³⁸

1. Small Carrier or Tribal Nation Transaction Prong

23. The small carrier or Tribal Nation Transaction prong of ECIP we adopt today will incentivize transactions that enable access to unused spectrum, furthering the underlying statutory goal of promoting spectrum availability for small carriers, while also expanding upon the Congressional directive in the public interest to include Tribal Nations.

a. Eligible Entities

24. Based on the record presented, we determine that any covered geographic licensee is eligible to participate as an assignor and any covered geographic licensee in an "included service" is eligible to participate as a lessor, and two types of entities are eligible as assignees or lessees in a Qualifying Transaction under this first prong: either small carriers or Tribal Nations. Consistent with the MOBILE NOW Act, each party to a Qualifying Transaction must be unaffiliated, as defined and discussed *supra*.

25. *Small Carriers*. Section 616 of the MOBILE NOW Act defined "Covered small carrier" as a carrier that "(A) has not more than 1,500 employees (as determined under section 121.106 of title 13, Code of Federal Regulations, or any successor thereto); and (B) offers services using the facilities of the carrier." The MOBILE NOW Act also applied the definition of "carrier," as set forth in section 3 of the Communications Act of 1934, as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy."³⁹ In the *FNPRM*, we proposed to apply the statutory definition of covered small carriers and sought comment on alternatives. Although many commenters supported the statutory definition of covered small carriers,⁴⁰ some suggested that we should expand this definition to include non-common carriers.⁴¹ In particular, WISPA argues that "requiring all covered small providers in non-rural areas to be common carriers would run counter to the stated policy of encouraging the provision of new technologies and services to the

³⁶ UTC Reply Comments at 5.

³⁷ *FNPRM* at 13, para.36.

³⁸ See 47 CFR 1.950(g).

³⁹ 47 U.S.C. § 153(11); see MOBILE NOW Act § 616(a)(1) 47 U.S.C. § 1506(a)(1).

⁴⁰ RWA Comments at 2-3, NCTA Reply Comments at 2.

⁴¹ WISPA Comments at 2-3, ITIF Comments at 3.

public.”⁴²

26. We decline at this time to expand our proposed definition of covered small carriers in establishing eligibility for this prong. We note that Congress’ directive in the MOBILE NOW Act focused specifically on making unused spectrum available to covered small carriers and promoting service to rural areas, and the current record in this proceeding has not been sufficiently developed to determine whether to extend the additional incentives of the small carrier prong of ECIP beyond those entities specifically contemplated by Congress. For purposes of this program, we therefore adopt the above statutory definition of “Covered Small Carrier” and designate them as an eligible beneficiary as a “small carrier” under this transaction prong.⁴³ As discussed *infra*, we establish a second transaction prong that includes non-common carriers as eligible entities in ECIP if they participate in a Qualifying Transaction to provide service to rural areas, consistent with Congressional focus. We recognize, however, that there may be potential public interest benefits to expanding eligibility under the first transaction prong in order to facilitate broad deployment of advanced spectrum-based services, and we accordingly seek further comment in the *Second Further Notice* on proposals to include non-common carriers in this prong and any limitations that may be required.

27. *Tribal Nations*. As proposed in the *FNPRM*, we also include Tribal Nations as an additional eligible beneficiary in this transaction prong, independent of whether they qualify as a small carrier. The *FNPRM* sought comment on whether the definition of Tribal Nations, as established in the Commission’s most recent proceedings involving Tribal Nations, was the best approach for the ECIP.⁴⁴ No Tribal Nation submitted comments or reply comments in response to the *FNPRM*, and one commenter specifically supported the definition of Tribal Nations proposed by the Commission.⁴⁵

28. We recognize the acute connectivity challenges that Tribal Nations face and believe that inclusion in the ECIP program will facilitate spectrum access by Tribal Nations in both rural and non-rural areas to help meet their communications needs. We therefore adopt our proposed definition of Tribal Nations as any federally-recognized American Indian Tribes and Alaska Native Villages, the consortia of federally recognized Tribes and/or Native Villages, and other entities controlled and majority-owned by such Tribes or consortia. In the *FNPRM*, we sought comment on how we should facilitate transactions involving entities seeking to serve native Hawaiian Homelands given there are no federally recognized Tribal Nations in Hawaii.⁴⁶ In the absence of responsive comments on this issue, we will consider future waiver requests for ECIP program eligibility on behalf of appropriate entities that manage or administer resources on behalf of Native Hawaiians or Hawaiian Homelands.⁴⁷ We recognize the connectivity issues Tribal Nations face, and believe their inclusion in ECIP is an important step to facilitate increased spectrum access. The Commission is committed to working with Tribal Nations to ensure that the benefits afforded through ECIP participation are fully realized.

b. Minimum Spectrum Threshold

29. As proposed, we adopt a minimum spectrum threshold for a qualifying transaction under this prong. Specifically, we require that, for licenses included in an ECIP transaction involving a

⁴² WISPA Comments at 4.

⁴³ For ease of reference, we use the term “small carrier” rather than “covered small carrier” used in the MOBILE NOW Act, though we incorporate into our rules the specific language of the statutory definition.

⁴⁴ *FNPRM* at 8, para. 18; *See Transforming the 2.5 GHz Band*, WT Docket No. 18-120, Report and Order, 34 FCC Rcd 5446, 5463, para. 47 (2019).

⁴⁵ RWA Comments at 9.

⁴⁶ *FNPRM* at 8, para.18.

⁴⁷ *See e.g., Department of Hawaiian Homelands Request for Waiver to File as an Eligible Entity in the 2.5 GHz Rural Tribal Priority Window*, Memorandum Opinion and Order, 35 FCC Rcd 2820 (2020).

disaggregation, partition/disaggregation in combination, or a lease, the assignor or lessor must include a minimum of 50% of the licensed spectrum, and must demonstrate that it meets the minimum spectrum threshold at every point in the transaction area (where the percentage is calculated at any point as the amount of spectrum being assigned/leased (in megahertz)/total spectrum held under the license (in megahertz)).⁴⁸ We believe that this minimum spectrum threshold will provide stakeholders flexibility in structuring transactions to facilitate sufficient spectrum availability for the underlying intended service, while simultaneously preventing transactions involving *de minimis* spectrum amounts that are potentially entered into solely to obtain ECIP benefits.

30. In the *FNPRM*, we sought comment on our proposal to require a 50% spectrum threshold. Although some commenters suggested that the Commission should generally lower the minimum spectrum threshold without advancing any specific proposals,⁴⁹ one commentator recommended the use of particular amounts of spectrum in megahertz rather than a percentage of spectrum associated with a license.⁵⁰ Specifically, RWA stated that the appropriate spectrum threshold figure should be based on the amount of spectrum needed for the particular technology in the intended service, noting that 20 megahertz minimum was required when using TDD technology and that 10 megahertz minimum was required when using FDD technology.⁵¹ In addition, RWA stated that using megahertz rather than a percentage can ensure that “the transferred spectrum is capable of providing 5G service, depending on the size of the license.”⁵²

31. We anticipate that secondary market transactions negotiated at arm’s length will result in parties acquiring sufficient spectrum to meet their communications needs. We find that requiring minimum spectrum amounts in megahertz to ensure, as RWA suggests, that a current technology can be successfully deployed, reduces stakeholder flexibility. Such an approach is not technologically neutral and may not adequately account for future technological advances. By taking a technologically neutral approach that requires a fixed percentage of spectrum relative to each license included in an ECIP transaction, we provide sufficient flexibility to allow a wide range of different WRS licensees the opportunity to participate in, and benefit from, the ECIP. This approach will likely increase the number of ECIP transactions, and foster participation by not effectively barring licensees with smaller spectrum amounts based on the original spectrum allocation in a particular radio service.

32. Some commenters argued that, “given the Commission’s topline goal of serving rural and Tribal communities, it should not matter how much of the license is transferred as long as this goal is accomplished” and “if a carrier can find a way to provide advanced telecommunications services with less spectrum, that is cause for celebration, not exclusion from ECIP.”⁵³ We disagree. The Commission must balance the goals and benefits conferred through the program with the potential harms of abuse, and we find that establishing a minimum spectrum threshold is necessary to prevent sham transactions (e.g., disaggregation of *de minimis* spectrum amounts simply to acquire program benefits). Accordingly, we adopt a 50% minimum spectrum threshold as proposed in the *FNPRM*. Provided the minimum spectrum threshold is met, parties to an ECIP Qualifying Transaction are free to negotiate specific terms for additional amounts of spectrum required to meet their operational or technological needs.

⁴⁸ As an example, we will not permit an assignee participating in ECIP to engage in a transaction whereby it partitions an area and disaggregates spectrum in combination, but seeks to include 75% of its spectrum in the western part of the partitioned area, and 25% of its spectrum in the eastern part of the partitioned area, in an attempt to meet the 50% minimum spectrum threshold through some form of averaging.

⁴⁹ Mavenir Comments at 4; ITIF Comments at 3.

⁵⁰ RWA Comments at 9.

⁵¹ *Id.* at 3-4.

⁵² *Id.*

⁵³ ITIF Comments at 9, RWA Reply Comments at 2.

c. Minimum Geography Threshold

33. After review of the record, we adopt a minimum geography threshold for Qualifying Transactions under this small carrier or Tribal Nation prong, whether a partition, partition/disaggregation in combination, full assignment or a long-term leasing arrangement. We also incorporate two-tiered geographic scaling based on the overall size of the licensed area in the underlying license from which the ECIP transaction originates to ensure equitable treatment across differently-sized licensed areas. Specifically, for licensed areas that contain 30,000 square miles or less, we require a minimum geography threshold of 25% of the licensed area. For geographic area licenses larger than 30,000 square miles in size, we require a minimum geography threshold of 10% of the licensed area. We believe this approach appropriately balances the size of the licensed area to create incentives for program participation and ensure sufficient land area for small carriers or Tribal Nations, while discouraging transactions involving *de minimis* geography entered into solely to obtain program benefits.

34. In the *FNPRM*, we proposed a 25% geography threshold to ensure sufficient land area was made available for the provision of advanced telecommunications services and to prevent fraud from transactions involving *de minimis* amounts of geography entered into for the singular purpose of receiving benefits.⁵⁴ We also sought comment on whether minimum geographic thresholds should be different based upon the varying sizes of the overall licensed area for any transactions filed under this prong.⁵⁵ One commenter proposed a required minimum square mileage instead of a percentage,⁵⁶ but did not offer specifics on the mechanics of scaling for transactions originating from assignors or lessors with larger licensed areas. Another commenter generally supported the Commission's proposed geography thresholds for county-based license areas, with the recommendation that the geographic threshold should depend on the size of the licensed area and should be smaller for licensed areas larger than counties.⁵⁷ Specifically, WISPA proposed a 10% geography threshold for larger licensed areas like CMAs and PEAs, while retaining the 25% threshold for smaller, county-based licensed areas.⁵⁸

35. We are persuaded that the scaling concepts advanced by these commenters provide a practical solution towards ensuring a fair and consistent application of the ECIP. We therefore find it in the public interest to adopt the two-tiered hybrid approach discussed above, based on the amount of square mileage within the licensed area of the assignor or lessor, regardless of the license type, to meet the required minimum geography threshold percentage. We believe this approach appropriately balances the goal of ensuring greater program participation, particularly for licensees with larger licensed areas that offer spectrum to others, and that benefit from program benefits applied to their entire license (e.g. extension of renewal deadline and construction deadlines), while protecting against potential abuse through transactions that include *de minimis* amounts of geography. Assignors or lessors are permitted to include more of their licensed area in a Qualifying Transaction than the minimum geography threshold in this prong, up to their entire licensed area, potentially resulting in a larger Transaction Geography in a Qualifying Transaction. We believe this allows sufficient flexibility to structure transactions based on the needs of the parties.

36. We clarify that under the small carrier or Tribal Nation transaction prong we adopt today, the geography assigned or leased can be from any type or size of covered geographic license and can include rural and/or suburban/urban areas, provided it meets the minimum geography threshold percentage described above. An ECIP transaction between unaffiliated parties, as required under this prong, may be either an assignment (full, partition, and/or disaggregation) or a lease, but not both, for

⁵⁴ *FNPRM* at 9, para. 20.

⁵⁵ *Id.*

⁵⁶ NTCA Reply Comments at 2.

⁵⁷ WISPA Comments at 5.

⁵⁸ *Id.* at 6.

each license. We impose this restriction to meet program goals, including the equitable distribution of program benefits and obligations, and therefore preclude an ECIP participant from, for example, partitioning a percentage of its licensed area, and then leasing another percentage of licensed area from the same license, which when combined meet the minimum geography threshold. While an ECIP application filed under this prong may include more than one license for assignment or leasing to a single assignee/lessee, each included license must independently meet the respective minimum geography percentage threshold, and will be independently reviewed and acted upon. Applications seeking ECIP benefits that do not satisfy the minimum spectrum and geography thresholds for each license on a stand-alone basis will be dismissed. We also clarify that parties participating in ECIP through this small carrier or Tribal Nation transaction prong remain subject to the substantive performance requirements (e.g. covering a certain population percentage, in most flexible use bands) as set forth in the underlying radio service(s) rules of the license(s) involved in the Qualifying Transaction. Finally, after review of the record, we find no basis to restrict the program to census defined populations.

2. Rural-Focused Transaction Prong

37. To further the important Commission and Congressional goals of facilitating the provision of advanced telecommunications service in rural areas, we provide a second possible path for ECIP participants through a rural-focused transaction approach. This prong expands the scope of eligible entities beyond those specifically referenced in the MOBILE NOW Act and is intended to facilitate coverage to rural areas by tying ECIP benefits to construction and operation obligations. We believe this second transaction prong will expand the class of eligible participants, resulting in greater potential for increased spectrum usage and competition in rural areas.

38. *Eligible Entities.* For purposes of this rural-focused transaction prong, we determine that any covered geographic licensee is eligible to participate as an assignor and any covered geographic licensee in an “included service”⁵⁹ is eligible to participate as a lessor. Further, any entity is eligible to participate as an assignee or lessee if able to meet the prong requirements described below, including, for example, large or small carriers, common carriers, non-common carriers, Tribal Nations, critical infrastructure entities, and other entities (large or small) operating private wireless systems. We reiterate that, consistent with the MOBILE NOW Act, each party to a Qualifying Transaction must be unaffiliated, as defined and discussed *supra*.

39. In the *FNPRM*, we sought comment on whether the Commission should consider rule revisions to an expanded class of licensees beyond those Congress required it to consider.⁶⁰ We proposed to include, by relying on our general Title III powers, any unaffiliated interested party that commits to serve a minimum amount of rural area under the proposed ECIP rural-focused transactions prong, if they meet the proposed requirements.⁶¹ Commenters unanimously supported the Commission’s proposal to adopt a rural-focused transaction prong available to anyone able to meet the requirements.⁶² After review of the record, we find it in the public interest to adopt our proposal to expand on the MOBILE NOW Act’s focus to incentivize transactions involving a wide variety of stakeholders seeking to provide services in rural areas that may currently face spectrum access challenges.

40. *Minimum Spectrum Threshold.* Similar to our treatment of the small carrier or Tribal Nation prong above and for the same rationale, we adopt the proposed 50% minimum spectrum threshold for each license(s) included in the Qualifying Transaction of the rural-focused transactions prong. Specifically, we require that, for licenses included in an ECIP transaction involving a disaggregation, partition/disaggregation in combination, or a lease, the assignor or lessor must include a minimum of 50%

⁵⁹ See 47 CFR § 1.9005.

⁶⁰ *FNPRM* at 9, para. 23.

⁶¹ *Id.*

⁶² WISPA Comments at 6-7, UTC Reply Comments at 4, RWA Comments at 5.

of the licensed spectrum, and must demonstrate that it meets the minimum spectrum threshold at every point in the transaction area (where the percentage is calculated at any point as the amount of spectrum being assigned/leased (in megahertz)/total spectrum held under the license (in megahertz)). The minimum spectrum threshold under this rural-focused transactions prong provides stakeholders flexibility in structuring transactions to facilitate sufficient spectrum availability for the provision of advanced telecommunications services in rural areas, while simultaneously preventing transactions involving *de minimis* spectrum amounts that are potentially entered into solely to obtain ECIP benefits.

41. In the *FNPRM*, we proposed in the rural context that a Qualifying Transaction must designate a minimum of 50% of the licensed spectrum, for each license included in the transaction, consistent with the small carrier or Tribal Nation transaction prong.⁶³ We also sought comment on whether the 50% spectrum threshold makes enough spectrum available for the actual provision of rural-focused service.⁶⁴ Many commenters advanced arguments similar to those presented with respect to the minimum spectrum threshold the Commission proposed in the small carrier or Tribal Nation transaction prong.⁶⁵ We find that adopting the minimum spectrum threshold is the best approach towards advancing the Commission's goals of fostering the provision of advanced telecommunications services and providing stakeholders flexibility in structuring transactions, while preventing transactions involving *de minimis* amounts of spectrum.

42. *Minimum Geography.* To achieve the Commission's policy goals of facilitating *bona fide* transactions that ensure rural service while providing substantial program benefits, we require that a Qualifying Transaction under this prong (e.g. a partition, partition/disaggregation in combination, full assignment or a long-term leasing arrangement) must include a minimum amount of "Qualifying Geography." We clarify that all geography identified as Qualifying Geography, for purposes of this rural-focused transaction prong, must be in a rural area, as defined below. In the *FNPRM*, for purposes of the rural-focused transaction approach and consistent with Congressional intent, we proposed to adopt the MOBILE NOW Act definition of "rural area."⁶⁶ Although some commenters supported this definition as the best approach for the ECIP, they expressed concerns regarding the application of the terms contiguous and adjacent in the statutory definition, and they suggested that the Commission should adopt a bright line rule to prevent less populated edges of urban areas from being excluded from the definition of rural area.⁶⁷

43. We adopt the statutory definition of "Rural Area," which is defined as any area except (1) a city, town, or incorporated area that has a population of more than 20,000 inhabitants; or (2) an urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants.⁶⁸ Although we understand commenters' concerns regarding areas adjacent to large cities/towns, we note that the MOBILE NOW Act did not provide an exception for the inclusion in the definition of "rural" those locations on the periphery of urban areas that are arguably less populated, but nonetheless are part of an urbanized area contiguous or adjacent to a city or town with a population of more than 50,000. We therefore recognize that parties may seek a waiver of the rule in certain unusual circumstances, which we will review pursuant to the criteria set forth in the Commission's rules.⁶⁹

44. As applied to the ECIP rural-focused transaction prong, we define Qualifying Geography

⁶³ *FNPRM* at 10, para. 26

⁶⁴ *Id.*

⁶⁵ UTC Reply Comments at 6, WISPA Comments at 4-5, 7.

⁶⁶ *FNPRM* at 10, para. 25.

⁶⁷ UTC Reply Comments at 6, WISPA Comments at 7, RWA Reply Comments at 3.

⁶⁸ See MOBILE NOW Act, § 616(a)(2), 47 U.S.C. § 1506(a)(2).

⁶⁹ See 47 CFR §§ 1.3, 1.925.

as at least 300 contiguous square miles for those licensed areas that are 30,000 square miles and smaller, with appropriate upward scaling for larger licensed areas. In the *FNPRM*, we proposed a minimum Qualifying Geography of 300 square miles of rural area for PEAs and smaller licensed areas. However, given the wide range in the size of Commission licensed geographic areas, we sought comment on whether it would be appropriate to scale the amount of Qualifying Geography on a proportional basis. We also sought comment on providing ECIP benefits to multiple licenses that contain some portion of the proposed 300 square mile Qualifying Geography. The *FNPRM* also proposed an approach intended to ensure that the scope of system coverage and service in rural areas warranted ECIP benefits. In response, commenters focused substantially on reduction of our proposed geography thresholds, essentially arguing that the provision of any rural service, regardless of the size of the area covered, should be sufficient to participate in ECIP and receive all benefits. In addition, WISPA suggested that an alternative proposal for minimum qualifying geography of 200 square miles would be preferable to the Commission's proposal, but failed to explain how its proposal would meet program goals in the public interest.

45. After reviewing the record and the varying geographic areas the Commission licenses in greater detail, we find that our proposed scaling approach that focused on license types (e.g. Partial Economic Area (PEA) or smaller) potentially could create inequities. Commission staff reviewed data regarding license types in Covered Geographic Services,⁷⁰ and found that, out of 410 PEAs, 399 (or 98%) were 30,000 square miles or less; however, certain other licensed areas larger than PEAs also consisted of 30,000 square miles or less.⁷¹ Accordingly, were we to adopt the "PEA and smaller" approach, as proposed in the *FNPRM*, as the standard for the 300 square mile minimum Qualifying Geography threshold, 141 out of 170 BEAs, 12 out of 46 MTAs, and 13 out of 46 MEAs, all geographic sizes larger than PEAs, but also containing only 30,000 square miles or less, would have been unnecessarily subject to higher minimum Qualifying Geography thresholds (e.g. 900 square miles). We seek to remedy this potential inequity through a more neutral approach that incentivizes transactions across all licensed areas in covered geographic services.

46. We therefore adopt a Qualifying Geography minimum threshold based on actual geographic license size in square miles and find that this slight modification to our proposed approach ensures equal treatment across similar sized licensed areas. Under the rural-focused transactions prong we adopt, the geographic threshold approach scaled for larger licensed areas in four categories is as follows: (1) Up to 30,000 square mile licensed areas – Qualifying Geography = 300 square miles; (2) 30,001-90,000 square mile licensed areas – Qualifying Geography = 900 square miles; (3) 90,001-500,000 square mile licensed areas – Qualifying Geography = 5,000 square miles; and (4) 500,001 square mile licensed areas and above – Qualifying Geography = 15,000 square miles.

47. We believe this approach ensures fairness and equal treatment across different license sizes and that scaling for larger licensed areas will ensure sufficient financial commitment by ECIP participants to yield more than nominal spectrum access. We also believe it achieves the Commission's goal of facilitating rural buildout sufficient to justify the ECIP benefits received, thus preventing windfall benefits. To afford ECIP participants substantial flexibility in structuring transactions and to incentivize participation under this rural-focused transactions prong, we permit assignors/lessors in Qualifying Transactions to include spectrum from multiple licenses, as long as the Qualifying Geography intersects each contributing license included in the underlying ECIP transaction application. To facilitate program participation under this rural focused transaction prong, however, we do not require a minimum square mileage of Qualifying Geography per contributing license, provided the sum total of the Qualifying Geography from the contributing licenses meets the required minimum threshold.

⁷⁰ The license area types reviewed include (from smallest to largest average area size): Counties, Cellular Market Areas (CMAs), Interactive Video Markets (IVMs), Basic Trading Areas (BTAs), Partial Economic Areas (PEAs), Basic Economic Areas (BEAs), Major Trading Areas (MTAs), Major Economic Areas (MEAs), VHF Public Coast (VPC), and Regional Economic Area Groupings (REAGs). See <https://www.fcc.gov/wireless/gis-wtb> (April 2022).

⁷¹ For example, 84% of BEAs, 26% of MTAs, and 28% of MEAs, consisted of 30,000 square miles or less.

48. To protect program integrity, in instances where a Qualifying Transaction consists of multiple licenses with varying sized licensed areas contributing to the Qualifying Geography, we require the Qualifying Geography to be scaled to the minimum geographic threshold of the largest licensed area included. For example, where the Qualifying Geography intersects three contributing licenses and, based on their smaller overall licensed area, two of the three contributing licenses would require a minimum Qualifying Geography of 300 square miles, and the third contributing license is a larger licensed area that would require 900 square miles of minimum Qualifying Geography, we require the Qualifying Geography for this ECIP Qualifying Transaction to consist of a minimum of 900 square miles.

49. Under ECIP, we do not mandate the maximum geographic scope of the parties' overall transaction, and clarify that the total Transaction Geography can be up to the entire licensed area of the contributing license(s), but no smaller than the minimum Qualifying Geography in the appropriate scaled category. This approach can potentially result in a larger Transaction Geography than the Qualifying Geography and affords program participants sufficient flexibility to structure transactions based on the needs of the parties. In this regard, we strongly encourage all parties to an ECIP transaction, and particularly assignees and lessees, to include as part of the overall transaction sufficient Transaction Geography to ensure that the Qualifying Geography will be 100% covered as required. We reiterate that both the Qualifying Geography and Transaction Geography is not determined by the Commission, but is voluntarily identified by the parties. As discussed below, both assignees and lessees are required to cover 100% of the Qualifying Geography, and this requirement becomes the assignee's substituted performance obligation in lieu of the service rule obligation. We advise parties to perform the proper due diligence in advance of filing an ECIP application to ensure that site access and/or propagation issues will not prevent the assignee or lessee from meeting its construction requirement. Failure to do so, resulting in subsequent arguments that the 100 % Qualifying Geography coverage requirement cannot be met, is a consideration in the Commission's evaluation as to whether the parties entered into a good faith transaction with a *bona fide* intent to meet the program's obligations. Finally, in any transaction involving licenses authorized in mixed spectrum bands, we clarify that all end-user devices operating throughout the Qualifying Geography must be capable of operation on all spectrum bands for contributing licenses that are part of the transaction. As described below in the section detailing measures to curtail waste, fraud and abuse,⁷² without this functionality, we cannot conclude that coverage is being provided throughout the Qualifying Geography.

C. Enhanced Competition Incentive Program Benefits

50. In this Report and Order, we adopt the three ECIP benefits as proposed in the *FNPRM*. Specifically, where applicable, we afford participants a five-year license term extension, a one year construction extension, and alternative construction requirements for rural-focused transactions. The record in this proceeding supports these important incentives as a tangible measure toward promoting greater access to spectrum for small carriers or Tribal Nations and the provision of advanced telecommunications services to rural areas.⁷³ We discuss below in further detail each ECIP benefit.

51. *License Term Extension* – We adopt a five-year license term extension for the following: all parties involved in a qualifying partition/disaggregation transaction; the lessor entering into a qualifying spectrum leasing transaction, given that the lessor retains the license renewal obligations; and the assignee in full license assignments. We believe this benefit will substantially reduce regulatory burdens associated with renewal obligations and will properly incentivize secondary market transactions, particularly spectrum leases that are subject to the lessor's license term.

52. In the *FNPRM*, we proposed a five-year license term extension as an ECIP benefit for Qualifying Transactions. Nearly all commenters supported this program benefit as a positive shift in the transaction costs making secondary-market transactions more worthwhile to participants, and effectively

⁷² See *infra*, sec. III.D.

⁷³ ITIF Comments at 3, WISPA Comments at 8-9, RWA Comments, EWA Comments at 3.

incentivizing those transactions.⁷⁴ Commenters also noted that this license term extension, in combination with the construction extension described below, will incentivize secondary market transactions for licensees that have yet to meet their buildout requirements.⁷⁵

53. We note that ECIP is available to a wide variety of WRS licenses, most of which have a renewal showing obligation requiring a demonstration of continued service at or above that required to meet the original construction obligation.⁷⁶ We believe that the license term extension benefit offers an incentive, consistent with Congressional direction, to licensees that have yet to meet their construction obligations or those that may not have maintained the required level of service throughout the course of their license term. Accordingly, we adopt our proposal to implement a five-year license term extension to Qualifying Transactions in the ECIP.

54. *Construction Extension.* We adopt a one-year construction extension for all parties to a Qualifying Transaction for both the interim and final construction benchmarks, where applicable. As described below, this benefit applies to the following parties in an ECIP transaction: both parties in a Qualifying Transaction involving partition and/or disaggregation; to the lessor in a qualifying spectrum lease arrangement, and to the assignee in a full license assignment.

55. In the *FNPRM*, we proposed that, where applicable, all parties to a Qualifying Transaction receive a one-year construction extension for both the interim and final construction benchmarks.⁷⁷ We also proposed that this benefit would apply to both parties in a Qualifying Transaction involving partition or disaggregation, and to the lessor in a qualifying spectrum lease arrangement, given that the lessor retains the obligations to comply with buildout and renewal requirements.⁷⁸

56. While commenters support the construction extension ECIP benefit, several commenters offered alternative proposals.⁷⁹ WISPA recommended a two-year extension or a non-population-based performance requirement.⁸⁰ RWA noted the Commission could consider extension time frames based on the geography covered.⁸¹ For example, under RWA's proposal, 300-500 contiguous square miles would qualify for a one-year extension; 501-750 contiguous square miles would qualify for a two-year extension; and 751-999 contiguous square miles would qualify for a three-year extension.⁸² Another commenter recommended extending the deadlines by two years if the lease, partition, disaggregation, or full license transaction is reached within 12 months of the incumbent licensee's build-out deadline to incentivize transactions and allow assignees sufficient time to meet construction deadlines.⁸³ Some commenters noted that ECIP would not have an impact on those that have already met their construction obligations.⁸⁴

⁷⁴ RWA Comments at 10, WISPA Comments at 9, UTC Reply Comments at 7.

⁷⁵ WISPA Comments at 9, RWA Comments at 10.

⁷⁶ See *Amendment of Pts 1, 22, 24, 27, 74, 80, 90, 95, & 101 To Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services*, Second Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 10-112, 32 FCC Rcd 8874 (2017), para. 27.

⁷⁷ *FNPRM* at 12, para. 32.

⁷⁸ *Id.*

⁷⁹ RWA Comments at 12, WISPA Comments at 9, UTC Reply Comments at 7.

⁸⁰ WISPA Comments at 9.

⁸¹ RWA Comments at 5.

⁸² *Id.*

⁸³ UTC Reply Comments at 8.

⁸⁴ RWA Comments at 8.

57. After review of the record, we are not persuaded that additional time beyond a one-year construction extension of the service rule benchmark is warranted as an ECIP benefit. We seek to facilitate secondary market transactions that will benefit those needing increased spectrum access, as well as the provision of advanced telecommunications services to rural areas. Although Congress specifically focused on the Commission affording construction relief to help realize these policy goals, we are mindful that providing additional time to construct, while beneficial to the licensee recipient, correspondingly results in a delay in the ultimate provision of services to the public. Further, pursuant to the MOBILE NOW Act,⁸⁵ the Commission is charged with assessing the administrative feasibility of the program, and we believe that substantially adding to the complexity of ECIP by adopting commenter-suggested gradations of construction extension benefits would not be in the public interest. Therefore, as discussed below, we adopt a one-year construction extension for both the interim and final construction benchmarks, where applicable. We also note that the Commission's rules are very clear with regard to circumstances that would not warrant an extension of time, and specifically state that construction and coverage deadline extension requests will not be granted due to transfers of control or assignments of authorization.⁸⁶ For the ECIP program, however, Congress directed the Commission to consider incentives that we may deem appropriate to facilitate transactions, and specifically included this type of relief as a possible incentive. We find that application of this benefit serves the public interest as an incentive to participate in ECIP. We also clarify that construction deadlines previously extended through grant of a waiver may not be automatically transferrable to the assignee, unless specified by the waiver grant instrument. If transferrable, and where such as further transfer is predicated upon the recipient justifying the waiver relief, ECIP assignees must separately justify any waiver relief separate from, and prior to, grant of ECIP benefits.

58. *Alternate Construction Benchmark for Rural-Focused Transactions.* For the rural-focused transactions prong, we substitute an assignee's existing service rule-based performance requirement, if applicable, for the entire Transaction Geography as reflected on the assignee's new license created through ECIP, with the alternative construction benchmark described below. This benefit is provided to assignees in a Qualifying Transaction involving partition, partition and disaggregation combination, or full license assignment. Specifically, under ECIP, an assignee or lessee is required to provide 100% coverage to its Qualifying Geography, which is at least 300 square miles for licensed areas up to 30,000 square miles, with upward scaling by licensed area size as discussed above.⁸⁷ Although we require an assignee or lessee to meet the 100% Qualifying Geography coverage requirement to provide rural service in exchange for ECIP benefits, we do not substitute the alternative construction benchmark to leasing arrangements, as the lessee has no service-rule based performance benchmark requiring substitution. Moreover, under the Commission's rules, the lessor has the responsibility to meet underlying performance benchmarks for its entire license and also retains the ability to count any lessee construction towards lessor's buildout obligation.

59. In the *FNPRM*, we proposed to substitute an assignee's existing performance requirement with an alternative construction benchmark for licenses acquired in a qualifying ECIP transaction under the rural-focused transaction approach. Specifically, we proposed that the alternate construction benchmark would require 100% coverage of the Qualifying Geography (coverage to at least 300 contiguous square miles of rural area, for PEAs or smaller) that was the basis for the Qualifying Transaction, as well as the provision of service to the public, or operation that addresses private internal business needs over that entire geography. Many commenters expressed concern about the 100% coverage requirement of the qualifying geography involved in the rural-focused transaction prong, arguing that it does not strike the correct balance and provides no flexibility.⁸⁸ T-Mobile expressed

⁸⁵ MOBILE NOW Act § 616(b)(2)(D), 47 U.S.C. § 1506(b)(2)(D).

⁸⁶ 47 CFR § 1.946(c)(3).

⁸⁷ See *supra*, paras. 44-49.

⁸⁸ RWA Comments at 12, T-Mobile Comments at 7.

concerns regarding the reasonableness of the 100% coverage performance requirement, believing it to be an impossible standard to meet.⁸⁹

60. Based on our review of the record, we believe that many commenters' views on this issue were driven by a misconception that our proposal required 100% coverage of all geography included in the overall transaction, regardless of size. We reiterate that although we require 100% coverage of the Qualifying Geography, parties to an ECIP transaction are free to include significantly more geography than the minimum square mileage of Qualifying Geography required to be constructed. In fact, under some circumstances the Qualifying Geography coverage requirement can likely be met through construction of a single transmitter with approximately a ten mile radius of operation, though we anticipate that assignees or lessees may deploy multiple transmitters to ensure robust network coverage and to provide sufficient buffer to ensure 100% coverage of the Qualifying Geography. We find that substituting service rule requirements with mandatory coverage of Qualifying Geography for those assignees with remaining performance requirements represents a key benefit and an incentive to participate in ECIP, while still requiring a legitimate investment in network infrastructure that will result in public interest benefits in rural areas.

61. In adopting the substitution of an alternative construction requirement in lieu of service based requirements for rural-focused transactions (for assignees involved in partitioning and/or disaggregation or full license assignments), we clarify our treatment of the interim and final construction deadline in two distinct scenarios. First, where the interim performance requirement has not been met at the time of the ECIP transaction, the assignee meets its interim performance obligation for the entire Transaction Geography specified in its new authorization (if larger than the Qualifying Geography) by complying with this alternative approach, and we remove the final performance requirement set forth in the service rules for the particular license acquired in the ECIP transaction. Second, where an assignor has previously met the interim construction deadline, this alternative construction benchmark will replace the final construction obligation for the assignee's entire Transaction Geography. We believe this flexible approach will facilitate rural-focused transactions and will ensure a reasonable stakeholder investment in rural buildout sufficient to warrant ECIP benefits.⁹⁰

D. Enhanced Competition Incentive Program Protections Against Waste, Fraud, and Abuse

62. In this *Report and Order*, we adopt several measures proposed in the *FNPRM* to protect the integrity of ECIP from potential waste, fraud, and abuse and to promote the program's goals of increased spectrum access, rural service, and competition.⁹¹ These protections include: (1) a requirement for applicants seeking to participate in ECIP to select either the small carrier/Tribal Nation prong or the rural-focused transaction prong, but not both, for each ECIP transaction, without the option of changing prongs once selected; (2) a five-year holding period on licenses assigned through partitioning and/or disaggregation from an ECIP transaction, and a five-year minimum term for leasing arrangements; (3) an operational requirement of 100% coverage of the Qualifying Geography for three consecutive years for rural-focused transactions; (4) automatic termination of the relevant ECIP license and bar from future program participation for a licensee's failure to comply with the five-year holding period or to meet the applicable buildout and operational requirements (as required for rural-focused transactions); and (5) a

⁸⁹ T-Mobile at 8. RWA also commented that it is impossible to achieve 100% coverage. RWA Comments at 12.

⁹⁰ In the event an assignee has no performance obligation because the respective interim and final benchmarks have been satisfied, we do not confer the benefit of a substituted performance obligation.

⁹¹ We also clarify that, unless specified herein, participation in the ECIP does not relieve a licensee of the obligation to comply with other Commission rules including, but not limited to, the following: (1) designated entity eligibility requirements or the obligation to make an unjust enrichment payment when required; (2) competitive review of an ECIP transaction if needed; (3) the application of a service-specific spectrum aggregation rule; or (4) obligations required by the Tribal Lands Bidding Credit rule.

one-time cap on ECIP benefits for each license subject to a Qualifying Transaction (e.g., the original license and the subsequent license(s) issued from a partition and/or disaggregation). In adopting these program protections, we acknowledge that ECIP is in its nascency, and that we will continue to fine-tune the program to enhance its effectiveness and to better meet our objectives. With this in mind, as proposed⁹² and as discussed below, we direct the Wireless Telecommunications Bureau to conduct an evaluation of the program and prepare a report to the Commission no later than five years after the effective date of this *Report and Order*.

63. Several commenters did not believe that many of the upfront program protections proposed in the *FNPRM* were necessary, preferring instead after-the-fact Commission enforcement action for any malfeasance.⁹³ As with any Commission program conferring a benefit and intended to achieve results that serve the public interest, we find it imperative to establish adequate protections to avoid the potential of waste, fraud, and abuse. Indeed, some of the protections we adopt today were specifically included in the MOBILE NOW Act and have been implemented in prior Commission proceedings to guard against anti-competitive behavior and abuse of Commission process.⁹⁴ Based on our experience administering wireless licenses to support the provision of service to rural areas, we find that implementing the protections discussed in more detail below aligns with our program goals and serves the public interest to facilitate, as much as possible, intense spectrum utilization in these underserved areas. We therefore decline to adopt various alternative proposals from commenters, most of which are aimed at softening the penalties for an assignor/lessor when the assignee/lessee fails to fulfill its ECIP obligations.⁹⁵ We believe, however, that our approach addresses a major commenter concern (ensuring that the assignor/lessor is not unduly punished for the failings of the assignee/lessee) while also protecting ECIP from waste, fraud, and abuse.

1. Single Prong Selection Required for ECIP Participation

64. To avoid gamesmanship and provide for administrative efficiency, ECIP participant(s) must select either the small carrier/Tribal Nation prong or the rural-focused transaction prong, even if the receiving party is otherwise eligible for both options. In the *FNPRM*, the Commission sought comment on whether to require ECIP participants to choose between prongs, given that many parties to an ECIP transaction could likely meet the eligibility requirements for both prongs.⁹⁶ We also asked about the costs and benefits of taking such an approach.⁹⁷ RWA supports the proposed approach, stating that to allow otherwise “would be to allow applicants to game the system.”⁹⁸ No commenters opposed this approach.

65. We find it more efficient and in the public interest to adopt a requirement that provides a clear and distinct path to ECIP participation by mandating that parties to an ECIP transaction may select

⁹² *FNPRM* at 17, para. 50.

⁹³ See, e.g., ITIF Comments at 4 (“Five-year holding periods or lease terms would inject sclerosis into a system that should be tuned for dynamism”); NTCA Reply at 5 (opposing automatic termination).

⁹⁴ See, e.g., MOBILE NOW Act § 616, 47 U.S.C. § 1506 (stating that automatic license termination is the consequence of failure to buildout); 47 CFR § 20.22 (requiring a holding period for 600 MHz reserve licenses); 47 CFR § 1.946 (automatic termination for failure to build-out wireless licenses in certain radio services).

⁹⁵ See RWA Comments at 15, 17-18 (recommending (1) the lessor’s loss of benefits be prorated depending on how prematurely the lessee terminates a lease still subject to the five-year minimum lease period; and (2) instead of automatic termination, apply a condition for rural-focused transactions, where the assignor/lessor’s construction extension is conditioned on an assignee/lessee’s timely compliance with its construction deadline, and reduce the five-year license term of an assignor based on the percentage of lack of coverage due to the assignee’s failure to meet its buildout requirement.).

⁹⁶ See *FNPRM* at 14, para. 39.

⁹⁷ See *id.*

⁹⁸ See RWA Comments at 14.

either prong, but not both. This approach results in consistent application of program benefits and ensures program integrity by requiring applicants to follow through with their stated commitment to provide certain public interest benefits, and also reduces the potential for gamesmanship in ECIP prong selection. Accordingly, parties to an ECIP transaction are required to make a prong selection in the application filed with the Commission to approve the ECIP transaction, i.e., an FCC Form 603 (for partitions and/or disaggregation) or FCC Form 608 (for leases). Once the associated application has been granted by the Commission, the parties (now ECIP participants) are not permitted to change their selection.

66. This restriction ensures that no party changes its ECIP prong selection, particularly towards the end of the period allotted for completing construction obligations, thereby leveraging potentially more favorable regulatory requirements. For example: Licensee A (the assignor) and Licensee B (the assignee) both file an FCC Form 603 application, selecting the rural-focused transaction prong, with Licensee B committing to provide service to a partitioned rural area of at least 300 rural square miles of Qualifying Geography as a substitute for an upcoming performance deadlines mandated under our service rules. Under this prong, Licensee B must meet the applicable construction and operational requirements for that area by the extended construction deadline. Once the Commission grants the application,⁹⁹ Licensee B is not permitted to later elect, in lieu of meeting its obligation to provide service throughout its chosen Qualifying Geography, to meet the performance requirements applicable under the small carrier or Tribal Nation prong, i.e., covering a percentage of the population within its license area (as required in many flexible wireless radio services), which may include more sub-urban and urban populations—even if Licensee B could have originally qualified for that prong as a small carrier. We find that this approach aligns with the program’s goals of fostering increased accessed to spectrum and the provision of rural service, ensures transparency by providing concrete criteria and expectations to program participants and the public, and is a less burdensome and a more efficient way to administer the program.¹⁰⁰

2. Holding Period

67. With certain exceptions described below, we adopt a five-year holding period during which licensees cannot further partition, disaggregate, assign or lease licenses assigned through ECIP. We similarly adopt a five-year minimum lease term for long-term spectrum manager or long-term *de facto* transfer leasing arrangements under ECIP. In the *FNPRM*, we sought comment on our proposal, and on whether an alternative length of time was appropriate for the holding period for partitioned and/or disaggregated licenses considering the ECIP benefits conferred.¹⁰¹ We also asked whether a five-year minimum lease term was appropriate for lease arrangements, while recognizing that market realities might necessitate early termination of a lease agreement.¹⁰² We therefore sought comment on how we should treat a lease terminated prior to the expiration of five years.¹⁰³ Specifically, we sought comment on whether early lease termination should result in the lessor losing the benefits already applied to its license, or whether such benefits should be prorated based on how prematurely the lease was

⁹⁹ We clarify that, as with any transaction seeking Commission approval to alienate licensed spectrum, and independent of ECIP, the applicant(s) must otherwise meet the requirements to be Commission licensees and the Commission must deem the transaction to be in the public interest. *See* 47 U.S.C. § 310(d).

¹⁰⁰ For instance, most transactions involving an assignment or lease are filed on FCC Forms 603 and 608, respectively. We maintain this filing methodology under ECIP and we clarify that, in order to facilitate Commission review, an ECIP application will be ineligible for processing under immediate approval procedures and will instead be subject to our general approval procedures. *See* Appendix A *infra*, containing amendments to Commission rule sections 1.948(j) (IAP for assignments and transfers of control); 1.9020(e)(2) (IAP for spectrum manager leases); and 1.9030(e)(2) (IAP for *de facto* leases).

¹⁰¹ *See FNPRM* at 14, para. 40.

¹⁰² *See id.* at 15, para. 41.

¹⁰³ *See id.* at 14-15, para. 41.

terminated.¹⁰⁴ We also asked whether we should restrict leasing and subleasing of spectrum rights obtained through ECIP.¹⁰⁵

68. WISPA and RWA generally support the Commission's imposition of a five-year holding period on licenses, as well as a five-year minimum lease term, stemming from any ECIP transaction,¹⁰⁶ explaining that it will "curb the potential for license-flipping."¹⁰⁷ However, RWA requests an exception to the holding period for any licensee that intends to exit the wireless business.¹⁰⁸ ITIF opposes a holding period altogether, stating that imposing such a requirement would "inject sclerosis into a system that should be tuned for dynamism."¹⁰⁹ In the leasing context, RWA urges the Commission to adopt an alternative penalty scheme for lessees that prematurely terminate a lease due to bankruptcy.¹¹⁰ RWA further argues that the Commission should permit leasing arrangements without restriction, but the "lessor/sublessor should not be entitled to further ECIP benefits."¹¹¹

69. We find it in the public interest to adopt a five-year holding period for licenses and a five-year minimum term for leases, with limited exceptions described below. Specifically, assignees of licenses obtained through partitioning and/or disaggregation or full license assignment pursuant to an ECIP-related transaction may subsequently assign or lease, in whole or in part, those licenses to other entities, regardless of whether the entity receiving the license is ECIP-eligible, only after a five-year holding period starting from the date of license issuance, and provided that the assignee has met any relevant construction requirement (interim and final) and operational requirement discussed below (for rural-focused transactions) for those licenses.¹¹² We also require lessors and lessees participating in ECIP to commit to at least a five-year lease term for long-term spectrum manager or long-term *de facto* transfer leasing arrangements. We acknowledge that this five-year restriction may not directly align with parties' immediate business needs in all cases, but we believe that this approach, on balance, best promotes the goals of the program, effectively deters unwanted behavior, and serves the public interest.

70. *Restriction on leasing and subleasing of spectrum rights obtained through ECIP.* We adopt our proposed approach to prohibit the leasing or subleasing of spectrum by ECIP assignees and lessees during the five-year holding period or five-year minimum lease term, respectively. In leasing/subleasing arrangements after the applicable five-year period, the lessee or sublessee will not receive ECIP benefits, consistent with the one-time ECIP benefit rule we discuss below. One commenter argues that subleasing should be permitted but not to an affiliate of the lessor.¹¹³ While this suggestion, if implemented, may prevent entities from engaging in certain unwanted behavior, we nonetheless remain concerned about situations where, for example, an ECIP licensee (or lessee) monetizes its benefits by further leasing its spectrum rights to a third party, with no guarantee that the lessee/sublessee's activities will yield the public interest benefits intended by ECIP. We therefore decline to allow such leasing arrangements during the relevant five-year period to help ensure program obligations are met by assignees

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See WISPA Comments at 10-11; RWA Comments at 15.

¹⁰⁷ WISPA Comments at 10-11.

¹⁰⁸ See RWA Comments at 15. RWA further argues that assignees/lessees should be permitted to assign their licenses/leases during the holding period to other ECIP-eligible entities to the extent those entities agree to be bound by the ECIP requirements. See *id.*

¹⁰⁹ ITIF Comments at 4.

¹¹⁰ See RWA Comments at 15; RWA Reply at 7.

¹¹¹ RWA Comments at 19.

¹¹² See *infra*, sec. III.D.3.

¹¹³ See RWA Comments at 15.

and lessees, given the benefits ECIP provides, and to avoid providing an opportunity for program participants to circumvent our rules.

71. *Exceptions to the holding period.* Given the realities and challenges of today's ever-growing wireless market, and our consistent approach of providing flexibility to wireless radio service licensees to foster competition, we adopt an exception to the requisite holding period for *pro forma* transactions, including transfers and assignments. We have previously found *pro forma* transactions to be in the public interest because such transactions promote competition by allowing service providers to change their ownership structure or to reorganize without regulatory delay, increasing a provider's ability to compete in today's marketplace—a goal repeatedly advocated by Congress and the Commission.¹¹⁴ For instance, licenses often must be transferred or assigned internally as a result of a carrier merger after a substantial transfer or assignment. One commenter expressed support for this exception, with no party expressing opposition.¹¹⁵ Accordingly, we adopt this exception.

72. We also adopt an exception to our holding period for lease arrangements, including subleases, involving providers of Contraband Interdiction Systems (CIS). After review of the record, we agree with CTIA that such an exception is in the public interest. We find that ECIP restrictions intended to prevent waste, fraud, and abuse should not be applied to vital public safety-related leasing or sub-leasing arrangements intended to deploy systems that prevent contraband wireless device use in correctional facilities.¹¹⁶ Specifically, to enable an ECIP assignee or lessee to lease/sublease a license (or some portion thereof) to a CIS provider, we will provide an exception to the: (1) five-year holding period or five-year minimum lease term; (2) operational requirement for rural-focused transactions (as applicable); (3) prohibition against leasing/subleasing during the relevant five-year period; and (4) penalties for failing to comply with certain program obligations. We find that this approach is consistent with our ECIP program goals, and enables CIS operation where needed to promote public safety.

73. In adopting this exception, we reiterate, as the Commission has previously acknowledged in separate proceedings, that CIS providers require access to all the commercial spectrum bands covering the footprint of the correctional facility to effectively operate, and that any gap in coverage could render the system less effective.¹¹⁷ Because of these operating parameters, a CIS provider will likely need to enter into multiple spectrum leasing arrangements for the same geographic area covering the correctional facility.¹¹⁸ Given the public safety importance of protecting correctional facility staff and the public from the potential harms associated with the use of contraband wireless devices, we find it in the public interest to adopt narrow exceptions to the program protections we adopt today.

74. We decline, however, to adopt an exception for licensees that are exiting the wireless business, as requested by RWA.¹¹⁹ Given the various business models under which WRS licensees operate, we find it impractical to apply a one-size-fits-all standard to a proposed transaction involving an

¹¹⁴ See *Federal Communications Bar Association's Petition for Forbearance From Section 310(d) of the Communications Act/Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance*, Memorandum Opinion and Order, 13 FCC Rcd 6293, 6303, para. 16 (1998).

¹¹⁵ See RWA Comments at 15.

¹¹⁶ See CTIA Comments at 14-15; see also USCC Reply at 3.

¹¹⁷ See *Promoting Technological Solutions to Combat Contraband Wireless Device Use in Correctional Facilities*, GN Docket No. 13-111, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 2336, 2346-47, para. 23 (2017) (*Contraband Report and Order and Further Notice*); see also *Promoting Technological Solutions to Combat Contraband Wireless Device Use in Correctional Facilities*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 36 FCC Rcd 11813 (2021); CTIA Comments at 14-15; USCC Reply at 3.

¹¹⁸ See *Contraband Report and Order and Further Notice*, 32 FCC Rcd at 2346-47, para. 23.

¹¹⁹ See RWA Comments at 15.

ECIP-participating licensee intending to exit the wireless business. We also note that the Commission does not generally permit a licensee to rely on business decisions and related transactions to justify a request for extension or waiver of performance requirements.¹²⁰ Further, applying such a rigid standard can also run counter to the goals of the ECIP; if the standard is too lenient, it may be used by an ECIP entity to circumvent the Commission's rules¹²¹ and, if the standard is too harsh, it may prevent program participation and/or hinder competition. We therefore elect to address these types of situations on a case-by-case basis. As such, where an ECIP licensee intends to exit the telecommunications industry prior to the end of the requisite holding period or prior to the expiration of any applicable five-year lease term, we will entertain waiver requests for review under the criteria set forth in section 1.925 of the Commission's rules.¹²²

75. We also decline to adopt an exception to the five-year minimum lease term, or an alternative penalty scheme, for lessees that prematurely terminate their lease due to an involuntary transaction, such as bankruptcy.¹²³ Based on our experience gained by administering transactions involving wireless licenses, we believe that adopting an exception for a lease termination resulting from involuntary transactions is unnecessary as such circumstances are atypical. We recognize, however, that a waiver of the five-year minimum lease term may be sought in unusual circumstances.¹²⁴

3. Operational Requirement for Rural-Focused Transactions

76. For rural-focused transactions, we adopt an operational requirement whereby the assignee or lessee must operate or provide service throughout the entire Qualifying Geography for a minimum of three consecutive years.¹²⁵ In the *FNPRM*, we sought comment on this proposal and on the appropriate start date of the operational period.¹²⁶ We asked for any alternative structures for standardizing operational requirements for the ECIP, including the associated costs and benefits.¹²⁷ Additionally, we sought comment on a proposed mandate that ECIP lessees meet the three-year operational requirement during the five-year minimum lease term, and we asked about the interplay of this proposed mandate with our concerns about early termination of leases given the realities of the wireless market, coupled with our desire to avoid program abuse through leasing.¹²⁸ In applying the operational requirement to ECIP lessees, we recognized in the *FNPRM* that there is no current Commission requirement for lessees to independently certify construction of leased spectrum because the lessor is responsible for meeting the construction requirements for a license.¹²⁹ We therefore sought comment as to whether such a

¹²⁰ See 47 CFR § 1.946.

¹²¹ For instance, RWA suggests the standard for which we should determine that an ECIP entity is exiting the telecommunications industry is the sale of two thirds or more of its wireless assets. See RWA Comments at 15. RWA does not, however, cite to any source or evidence in support of this metric for assessing whether an entity has in fact "exited" the wireless industry, and we find no independent basis to adopt such a standard.

¹²² See 47 CFR § 1.925.

¹²³ See RWA Comments at 15.

¹²⁴ For example, section 1.948(g) of the Commission's rules requires the filing of a transfer of control or assignment application to a qualified person or entity within 30 days of the death or legal disability of a licensee, a member of a partnership, or a person who held direct or indirect control of a licensee. See 47 CFR § 1.948(g).

¹²⁵ See *FNPRM* at 15, para. 43.

¹²⁶ See *id.* at 15, para. 44.

¹²⁷ See *id.* at 15, para. 43, 44.

¹²⁸ See *id.* at 15, paras. 41, 44.

¹²⁹ See *id.* at 15, para. 44.

requirement should be adopted for lessees participating in the ECIP.¹³⁰

77. One commenter, RWA, responded in support of our proposals, opining that an operational requirement for the rural-focused transactions prong in the program will “ensure that rural areas receive both the amount and level of service that the ECIP rules intend that they receive.”¹³¹ RWA further supports a requirement for lessees to independently certify construction of leased spectrum, insisting that such notifications should occur annually to prevent “sham leases.”¹³² No party opposed the operational requirement, including our proposed parameters for the requirement.

78. *Operational Requirement – Coverage.* Given the benefits afforded to participating licensees through ECIP, we find that adopting the operational requirement largely as proposed is in the public interest as a targeted measure to ensure that operation or the provision of service occurs throughout the entire Qualifying Geography for a sustained period. To fulfill the operational requirement, an assignee or lessee of an ECIP rural-focused transaction must, for a minimum of three consecutive years, operate or provide service to 100 % of the Qualifying Geography. Specifically, a common carrier assignee/lessee must provide signal coverage for 100% of the Qualifying Geography and offer commercial service in that area. An assignee/lessee that intends to operate private, internal communications for business purposes, including, for example, utilities, must demonstrate that it has fulfilled the three-year operational requirement by providing 100% signal coverage to the entire Qualifying Geography and certify that it has provided continuous private communications throughout that area for a minimum of three consecutive years. We also adopt our proposal to impose a minimum level service requirement during the three-year operational period.¹³³ During this three year period, operation/service must not fall below that used (or intended to be used) to meet the relevant construction requirement for assignees and lessors, and lessees must continue to provide service (or operate, to meet private internal business needs) throughout the entire Qualifying Geography, irrespective of whether the lessor attributes any of the lessee’s buildout for its performance benchmark compliance.¹³⁴

79. For assignees, we note that the applicable Qualifying Geography of which 100% coverage must be met to fulfill the operational requirement could vary, depending on the size of the license(s) contributed. As stated above, where the parties in an ECIP transaction elect to contribute different license sizes to the Qualifying Geography, we will determine the size of the Qualifying Geography by using the minimum threshold applicable to the largest contributing license it intersects (e.g., if the Qualifying Geography intersects a contributing license whose licensed area size is 30,001 to 90,000 square miles, the assignee’s 100% coverage requirement must be at least 900 square miles, even if the Qualifying Geography also intersects a contributing license with a licensed area of 30,000 square miles or less). In this scenario, where multiple licenses contribute to the Qualifying Geography, to meet the operational requirement, we will also require that all spectrum contributed (if from different spectrum bands) to the Qualifying Geography be accessible by end-user devices operating throughout the Qualifying Geography. By adopting such a requirement, we ensure that the alternative construction benchmark is not used in such a way to undermine an important ECIP goal, the enabling of diverse spectrum access and the provision of service to rural areas.

80. *Operational Requirement – Commencement of Three Year Period.* We apply the operational requirement both to assignees (whether through partitioning, partitioning/disaggregation in combination, or full assignment) and lessees. We recognize, however, that the Commission’s service rules regulate assignees and lessees differently, with varying rights and responsibilities applicable to each.

¹³⁰ *Id.*

¹³¹ RWA Comments at 16.

¹³² *Id.*

¹³³ See *FNPRM* at 15, para. 43.

¹³⁴ *Id.*

For example, a lessee does not have service rule-based performance benchmarks or license renewal obligations independent of the licensee lessor, whereas an assignee is issued a separate license, may have independent performance requirements (if not previously met by the assignor), and has renewal obligations. Further, as discussed above, in the case of leasing arrangements under ECIP, we do not substitute the alternate geographic construction requirement for the service-based rule requirement, because the licensee lessor has the option of counting lessee construction towards compliance with lessor's performance benchmark. Given these distinctions in regulatory treatment, we find it in the public interest to adopt, with certain modifications, our proposal regarding the date by which operation or service must commence to ensure both timely construction and three continuous years of operation, and we clarify below the application of the rule in various scenarios that involve assignees versus lessees participating in ECIP.

81. To not undermine the key ECIP benefit afforded through the extension of the interim and final performance benchmarks associated with an assigned license, we will require an assignee with an upcoming interim benchmark (or final benchmark, if the interim has passed) to commence the three year operational requirement no later than the date of the extended interim (or extended final, if no interim) construction deadline.¹³⁵ However, where a license assigned through ECIP has no service rule-based performance requirement because the licensee has met both the interim and final benchmarks, we require the assignee to commence the three year continuous operation requirement no later than two years after consummation of the ECIP transaction. This approach ensures prompt service/operation within the entire Qualifying Geography, regardless of whether the underlying performance requirements of the assignor's license that was partitioned, partition/disaggregated, or fully assigned, have been met. This approach also recognizes that a reasonable period of time might be required to construct the entire Qualifying Geography, particularly where the assignee may have acquired the Qualifying Geography as part of a larger Transaction Geography with plans to operate or provide service beyond the Qualifying Geography as part of a larger network.

82. With respect to lessees, we require the three year operational period to commence no later than two years following the commencement of the lease, regardless of whether the licensee lessor has an upcoming extended interim and/or final performance benchmark, or whether it has previously met both performance benchmarks. As stated above, we seek to ensure that leased spectrum within the Qualifying Geography is timely put to use in the public interest, given the ECIP benefits conferred to the licensee/lessor. This approach is therefore warranted, particularly where we do not substitute construction of the Qualifying Geography as an alternative performance requirement (unlike an assignee, where the service rule construction requirement has not yet been met) because a lessee has no independent performance obligation. Moreover, as noted, a licensee/lessor has the option, but is not required, to count lessee construction towards lessor's performance obligation, so lessee construction under the Commission's service rules is not mandatory. By requiring a lessee of spectrum through ECIP to operate or provide service no later than two years following lease commencement, we also ensure three years of continuous operation where ECIP parties enter into the minimum required five year lease term.

83. We clarify that the date of construction that commences that start of the required three-year period of continuous operation is the date reflected on either: (1) the assignee's timely-filed construction notification required under our service rules,¹³⁶ informing the Commission that the relevant buildout/coverage requirement has been met for the license at issue, or (2) its Initial Operational Requirement Notification, discussed below. Because lessees are not required under our service rules to file construction notifications, their date of actual construction will be the date indicated in its Initial Operational Requirement Notification. If the assignee or lessee files their Initial Operational Requirement Notification prior to the relevant construction deadline, we will count the date of construction certified to

¹³⁵ See *id.* at 15, para. 44.

¹³⁶ See 47 CFR § 1.946(d).

in that filing, as reflected in ULS, as the start date for the three-year operational period. For example, where the interim performance benchmark has not been met at the time of the ECIP transaction and the assignee does not fulfill its construction requirement until the extended interim construction deadline, the date of the extended interim deadline would apply for determining when the operational period commences. Alternatively, where the assignee elects to construct and file a notification with the Commission before the extended interim construction deadline, then the filing date of the notification governs.

84. *Initial and Final Operational Requirement Notifications.* In order to ensure that assignees and lessees of rural-focused prong ECIP transactions comply with the operational requirement, we require the filing of two notifications: 1) an Initial Operational Requirement Notification, to be filed within 30 days of the commencement of operations complying with the operational requirement; and 2) a Final Operational Requirement Notification, to be filed within 30 days of satisfaction of the operational requirement for three consecutive years. The Initial Operational Requirement Notification must include the following: 1) the date the assignee/lessee began operations; 2) a certification that the assignee/lessee satisfies the operational requirement of 100% coverage of the Qualifying Geography for that license or lease; and 3) technical data demonstrating such compliance. This filing is required regardless of whether the ECIP participant is also filing a traditional construction notification with the Commission to demonstrate compliance with any relevant performance benchmark. We direct the Bureau to release a public notice providing further details regarding these notifications and instructing program participants on compliance with this requirement. The Final Operational Requirement Notification must also include the following: (1) a certification that the network satisfied the operational requirement of 100% coverage of the Qualifying Geography for three consecutive years; (2) the date on which the three year period was completed; and (3) technical data demonstrating the coverage provided. The data obtained from these reports will also be critical component part of the Bureau's ECIP Evaluation Report, discussed below.

4. Prohibition on Bad-Faith Transactions

85. We find it unnecessary to penalize the assignor or lessor when the assignee or lessee is solely at fault for failing to adhere to the holding period, or meet the construction or operational requirement (for rural-focused transactions). In taking this approach, we observe that the assignee/lessee is an unaffiliated entity and that the assignor/lessor is not typically a guarantor of assignee/lessee performance, and therefore penalties should be applied to the party responsible for the violation and its affiliates. Additionally, we are aware that program participation may be hindered if we impose penalties on an assignor/lessor for the failures of the assignee/lessee that are beyond its control.

86. We remain committed, however, to preventing bad faith transactions which bring no public benefits in return for the ECIP benefits conferred. For instance, a licensee might actively seek an ECIP-eligible entity to derive ECIP benefits through a lease of unused spectrum rights without regard for whether that entity has the financial or technical resources to meet program requirements. Such agreements also might include compensating that recipient entity to participate in a transaction.

87. Accordingly, we will not penalize assignors/lessors that enter into good faith transactions with assignees/lessees for subsequent assignee/lessee failure to meet program obligations. However, where the assignor/lessor is found to have entered into a transaction solely to reap program benefits, whereby it knew or should have known the assignee/lessee could or would not meet program obligations, we will bar the assignor/lessor entity and its affiliates from future participation in ECIP (as discussed below), and may impose monetary penalties if appropriate. In taking this approach, we strike a balance between fostering spectrum access, increased competition, and facilitating service to rural areas through program incentives, and adopting appropriate protective measures that will not unduly hinder program effectiveness.

88. To address this concern, we require two new certifications to be included in the assignment and/or lease applications (FCC Forms 603 and 608, respectively). First, each party to the transaction must certify either that: 1) the licensee or lessor did not confer any benefit (monetary or otherwise) to the assignee/lessee as consideration for entering into the proposed ECIP transaction; or 2) if

the parties cannot make this certification, provide a description of the benefit(s) conferred. In some transactions, for example, the consideration to an assignee or lessee might include roaming privileges or sharing of infrastructure that would not be indicative of a bad faith transaction, but which nonetheless merits Commission review to ensure program integrity. Second, each party to the transaction must certify that it has entered into the transaction in good faith and that the licensee/lessor reasonably believes that the assignee/lessee has the resources and a *bona fide* intent to meet the program's obligations. We caution prospective ECIP participants that making a false certification or providing false information in an assignment or lease application is a violation of the Commission's rules, which may result in a forfeiture or other penalties.¹³⁷ Additionally, we direct the Bureau to refer suspected ECIP-related fraud or misrepresentation to the Enforcement Bureau.

5. Automatic Termination and Future Bar from ECIP Participation for Failing to Meet Certain ECIP Requirements

89. Consistent with the MOBILE NOW Act, we adopt our proposal to automatically terminate any license(s) assigned as part of an ECIP transaction where the assignee: (1) fails to comply with the five-year holding period, (2) fails to meet the relevant buildout requirement(s), and/or (3) fails to fully comply with the operational requirement (for rural-focused transactions). As proposed, we also bar from future program participation the licensee that was the subject of the automatic termination and/or any lessee that fails to comply with the holding requirement (including by subleasing or prematurely terminating their lease) or is found to have engaged in a bad faith transaction to obtain ECIP benefits, as well as any affiliate of those entities. This bar will also apply to lessors that prematurely terminate a qualifying lease. In addition, to ensure program integrity, we clarify that the bar will apply indefinitely to the licensee, lessor, and/or lessee, including any of its affiliates, as defined above.¹³⁸ This means any officer, director, or entity that directly or indirectly controls the licensee or is directly or indirectly controlled by the licensee, may be within the scope of persons subject to the bar. In order to maximize administrative efficiency, while also minimizing gamesmanship of our prohibition on barred entities participating in ECIP, a prospective ECIP participant will be considered "an affiliate of a barred entity" if it was affiliated with that entity either when the barred entity applied for the program for the transaction for which it was barred *or* at the time the prospective ECIP applicant applied to participate in the program.¹³⁹ Once a licensee/lessee has been barred from program participation, it will no longer be eligible for ECIP benefits for future transactions, even if it enters into transactions that would otherwise be eligible for such benefits.

90. In the *FNPRM*, we sought comment on these approaches to assignee-related program failures, and on what additional measures, if necessary, should be imposed to prevent potential program abuse by assignors and lessors.¹⁴⁰ In particular, the Commission asked how we should address a situation where the assignor or lessor obtains ECIP benefits through assignments or leases to entities it knows or should know cannot satisfy the relevant program obligations.¹⁴¹ We also asked whether we should extend program ineligibility and/or automatic termination penalties to the assignor or lessor in cases where the

¹³⁷ See 47 CFR §§ 1.17 and 1.80. Additionally, as indicated in FCC Form 603 and 608, making a willful false statement in the form or attachment is punishable by fine and/or imprisonment (under 18 USC § 1001) and/or revocation of any station license or construction permit (under 47 USC § 312(a)(1)), and/or forfeiture (47 USC § 503)).

¹³⁸ See *supra*, para. 20.

¹³⁹ For example, if Party A is barred from ECIP participation, Party B will be considered barred if Party B either: 1) was an affiliate of Party A when Party A applied for ECIP for the transaction that resulted in its bar; or 2) is an affiliate of Party A at the time Party B applies to participate in ECIP for its own transaction.

¹⁴⁰ See *FNPRM* at 16, para. 45.

¹⁴¹ *Id.*

assignee or lessee fails to meet its ECIP requirements.¹⁴²

91. NTCA and RWA oppose the automatic termination requirement and any bar against the assignor from participating in future ECIP transactions, asserting that the approach is “draconian” and such consequences would deter carriers from entering into ECIP transactions.¹⁴³ Instead, they advocate that the portion of the area that remains unserved should revert back to the Commission under “use it or lose it” rules.¹⁴⁴ RWA also opposes any extension of the proposed penalties to the assignor or lessor and its affiliates where the assignee or lessee does not meet program requirements.¹⁴⁵ RWA instead asserts that, for rural-focused transactions, the Commission should condition the assignor/lessor’s one-year construction extension on an assignee/lessee’s timely compliance with its construction deadline.¹⁴⁶ If an assignee/lessee subsequently fails to meet the buildout requirement, RWA also supports a reduction in the license term of the assignor, tied to the percentage of the lack of coverage resulting from the failure.¹⁴⁷ In the context of leasing, RWA argues that, when a lease is terminated before the five-year holding period, the lessor’s loss of benefits should be prorated against how prematurely the lease was terminated.¹⁴⁸

92. We find that the two consequences we adopt today, i.e., automatic license termination and a bar on future program participation, are necessary and appropriate measures to deter program waste, fraud, and abuse, given the substantial benefits being offered to ECIP participants. Based on our experience administering wireless licenses and programs that provide benefits in furtherance of the public interest, we find that these two penalties are appropriate measures to incentivize program participants to fulfill their core program requirements.¹⁴⁹ Importantly, the automatic termination provision is consistent with section 616 of the MOBILE NOW Act, which provides that “the right to the spectrum shall be forfeited” if a party “fails to meet any build out requirements set by the Commission.”¹⁵⁰ We also adopt these penalties to impress upon program participants the importance of meeting the obligations associated with receiving ECIP benefits and the general need for program compliance to ensure the program operates effectively.

93. At the same time, we seek to encourage ECIP participation by ensuring that the penalties are targeted and proportional to the gravity of the program participant’s failure to meet its ECIP obligations. We therefore limit the scope of actions that would merit automatic license termination against the ECIP assignee and its affiliates to the following: (1) failure to meet the five-year holding period; (2) failure to meet the relevant construction requirement for the license(s) at issue, either interim or final deadline; and (3) failure to meet the 100% coverage and three-year operational requirement for

¹⁴² See *id.* at 16, para. 46.

¹⁴³ See RWA Comments at 17-18.

¹⁴⁴ See NTCA Reply Comments at 5; RWA Comments at 17-18.

¹⁴⁵ See RWA Comments at 17-18.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See RWA Reply at 7.

¹⁴⁹ See, e.g., 47 CFR §§ 24.203 (Broadband Personal Communications Services), 90.665, 90.685 (Specialized Mobile Radio Service), 90.757 (220-222 MHz Band) (all of which have automatic termination if the licensee fails to meet its buildout requirements); see also 47 CFR §§ 54.8, 54.320 (suspension and debarments provisions in Universal Service). Additionally, under the 700 MHz Band Re-licensing Process, the original licensee who relinquished its usage rights to a portion of a 700 MHz license for failure to buildout cannot participate in the current re-licensing process. See *Service Rules for 698-746, 747-762, and 777-792 MHz Bands et al.*, Second Report and Order, 22 FCC Rcd 15289, 15348, 15353-54, paras. 153, 170-71 (2007); *Wireless Telecommunications Bureau Announces Process for Relicensing 700 MHz Spectrum in Unserved Areas*, Public Notice, 34 FCC Rcd 4789 (WTB 2019).

¹⁵⁰ See MOBILE NOW Act § 616, 47 U.S.C. § 1506.

the Qualifying Geography. The actions that will result in a bar from future participation in ECIP by the culpable party, as applicable, and its affiliates, are: (1) prematurely terminating a lease within the minimum five-year term or entering into a sublease in violation of ECIP rules; (2) failure to meet the five-year holding period; (3) failure to meet the relevant construction requirement for the license(s) at issue, either interim or final deadline; (4) failure to meet the 100% coverage and three-year operational requirement for the Qualifying Geography; and (5) entering into a transaction in bad faith, solely for the purpose of obtaining program benefits.

94. We clarify that, where appropriate, the automatic termination penalty will apply to the subject license regardless of whether the service rules for that license would yield a more lenient result.¹⁵¹ We also note that since an ECIP lessee does not hold the license subject to a qualifying lease, the automatic license termination penalty would not apply to it.

95. *Date on which a barred licensee/lessee will lose eligibility to participate in the ECIP and contents of notification.* When an ECIP licensee/lessee has failed to meet one or more of the above criteria by the relevant deadline(s), the bar commences on the date the licensee/lessee receives notice, which the Bureau will provide by letter. The letter will specify the reasons why the licensee/lessee will no longer be permitted to participate in ECIP and explain the scope and effect of the penalty. Additionally, we find that, consistent with the Commission's notice rules, notice has been provided once the Bureau sends such notice via electronic mail or U.S. Postal Service certified mail, using the last e-mail or physical address of record in ULS for that licensee/lessee.¹⁵²

96. *Effect of being barred from program participation.* Once an ECIP participant has been barred from future program participation, it, along with its affiliates, are no longer eligible to receive ECIP benefits for entering into a subsequent Qualifying Transactions. This applies to all parties in a transaction which would otherwise be ECIP-eligible; if a barred entity is a party to the transaction, it is not ECIP-eligible and no ECIP benefits will flow to any party to that transaction, even if the transaction meets all other ECIP criteria. Given that the established bar is from future program participation, a barred licensee/lessee may continue to receive existing ECIP benefits acquired through other unrelated ECIP transactions granted prior to the start date of the bar,¹⁵³ for example, where program obligations related to such other license(s) have been met.

6. Limitations on Additional ECIP Benefits for Subsequent Transactions

97. We will not provide additional ECIP benefits where a licensee has already received benefits for a license involved in a previous ECIP transaction. Specifically, if a license in a given transaction has previously been involved in any ECIP-related transaction and received ECIP benefits as a result, any party that holds that license (or some portion thereof) cannot subsequently receive ECIP benefits by including that license (including any sub-parts of the license, spectrally or geographically) in another ECIP transaction. This restriction applies to the original license in the ECIP transaction, as well as to the licenses issued through a partition and/or disaggregation.

98. In the *FNPRM*, we stated that this proposed limitation would prevent abuse resulting from

¹⁵¹ An example of a more lenient approach that we would not apply under ECIP is found in the 3.7 GHz service rules, where if a mobile licensee fails to meet the first performance benchmark, in lieu of license termination, the licensee's final benchmark would be accelerated by two years and the license term would be reduced by two years. *3.7 GHz R&O*, 35 FCC Rcd at 2389, para. 102.

¹⁵² 47 CFR § 1.5 ("For licensees in the Wireless Radio Services, each licensee shall also furnish the Commission with an email address to be used by Commission for serving documents or directing correspondence to that licensee; correspondence sent to such email address is deemed to have been served on the licensee.").

¹⁵³ We clarify that once an entity has been barred from participation in the program, the Commission will not process a pending application for ECIP participation to which it is a party, even where the application was initially accepted for filing prior to the date the bar commenced.

a licensee leveraging the same spectrum or geography to gain a repeated license term or construction extension and we sought comment on whether, in the alternative, a licensee should instead be eligible for ECIP benefits once per license included in an ECIP transaction.¹⁵⁴ One commentator supported the Commission's proposed limitation and no party opposed this measure, nor provided any alternatives to prevent "gaming" of the Commission's renewal and construction policies.¹⁵⁵ We adopt this limitation to prevent licensees from undermining our renewal and construction requirements by compounding ECIP-related extensions through multiple ECIP transactions.

E. ECIP Evaluation Report

99. To ensure ECIP promotes competition and increases spectrum access for small carriers and Tribal Nations, as well as increases service to rural areas, we direct the Bureau to evaluate the ECIP program and submit a report to the Commission. In the *FNPRM*, we proposed to direct the Bureau to conduct a review and evaluation of the ECIP, with interested stakeholder input, so that we may assess the program's effectiveness.¹⁵⁶ We also proposed that the Bureau submit the report to the Commission no later than five years from the effective date of this Order, that the report should include data about ECIP participation and recommended rule or policy changes, and that the report be made publicly available.¹⁵⁷ One commenter showed support for our proposals, with no one expressing opposition.¹⁵⁸

100. We adopt our proposal regarding an evaluation of the ECIP program. Specifically, no later than five years following the effective date of this *Report and Order*, we direct the Bureau to conduct an evaluation and submit a report to the Commission, detailing the progress and effectiveness of the program. Because the report could benefit from input from interested stakeholders, we also direct the Bureau and the Consumer and Governmental Affairs Bureau to conduct outreach, prior to the Bureau drafting the report, in order to yield meaningful evaluation and feedback of the ECIP from those interested stakeholders. As part of this outreach, we expect that both the Bureau and the Consumer and Governmental Affairs Bureau will monitor the program's effectiveness for Tribal Nations.

101. The report should include information about ECIP participation by eligible stakeholders, including the number of ECIP transactions since the inception of the program, as well as geographic areas and spectrum made available under each prong of the program. The report may include recommended rule and policy changes that would help improve the effectiveness of the program, including an assessment of whether the program is achieving benefits for Tribal Nations. Finally, the report should be made publicly available, although the Bureau may also prepare a non-public version with commercially sensitive information, if needed.

F. Reaggregation of Spectrum Licenses

102. Independent of establishing ECIP, today we increase licensee flexibility and adopt our proposal to permit license reaggregation up to the original geographic size and spectrum band(s) for the type of license, and also adopt accompanying proposed safeguards.¹⁵⁹ We find that allowing reaggregation will ease the administrative burden on both licensees and Commission staff. Further, we find that allowing reaggregation will create more certainty regarding our secondary markets rules and procedures to encourage licensees to engage in these types of transactions in the first instance.

103. Specifically, applicants seeking license reaggregation will be required to submit an

¹⁵⁴ See *FNPRM* at 16, para. 47.

¹⁵⁵ See *RWA Comments* at 19.

¹⁵⁶ See *FNPRM* at 17, para. 50.

¹⁵⁷ *Id.*

¹⁵⁸ See *RWA Comments* at 19.

¹⁵⁹ *FNPRM* at 21, para. 60.

application requesting a major modification pursuant to Commission rule 1.929,¹⁶⁰ as well as an attachment certifying compliance with three safeguards. The compliance certification must state that each license to be reaggregated has: (1) met all performance requirements (both interim and final benchmarks); (2) been renewed at least once after meeting any relevant continuing service or operational requirements; and (3) not violated the Commission's permanent discontinuance rules. These safeguards are intended to ensure that licensees seeking to reaggregate licenses are not doing so merely to avoid complying with the regulatory requirements (e.g. meeting performance benchmarks) associated with each license to be reaggregated.

104. The record reflects broad support for the Commission's proposal. CTIA and many other commenters express their support for the proposal to permit, but not require, licenses to be reaggregated up to the original geographic size and spectrum band(s) for the type of license being reaggregated.¹⁶¹ WISPA argues, however, that allowing reaggregation of licenses would undermine the purposes of the ECIP and the goals of the MOBILE NOW Act.¹⁶² WISPA further argues that the Commission should require a five-year holding period before an assignee could further assign the reaggregated spectrum to other entities, in addition to the Commission's three proposed conditions to reaggregate, to avoid "gamesmanship or spectrum warehousing by larger providers."¹⁶³

105. After review of the record, we agree with the majority of commenters that argue allowing reaggregation creates a "certainty that a license holder could re-aggregate partitioned or disaggregated licenses in the future" which "would eliminate a potential reason not to partition or disaggregate in the first instance."¹⁶⁴ We are not persuaded by WISPA's arguments for not permitting reaggregation, or for requiring a holding period before further assignment of reaggregated spectrum. We find that establishing a formal process for license reaggregation reduces regulatory and administrative burdens and could incentivize, not undermine, secondary market transactions consistent with the purposes of the ECIP and the goals of the MOBILE NOW Act. As the record reflects, we anticipate that requests for reaggregation will be submitted by licensees that, for business reasons, have reacquired licenses in their (or an affiliated party's) name potentially as part of a larger transaction, and now seek to reaggregate previously partitioned and/or disaggregated licenses into a single license largely for administrative purposes.¹⁶⁵ We find that the substantial benefit of establishing a formal process for license reaggregation, coupled with our proposed safeguards to qualify for reaggregation, renders a five-year holding period unnecessary. Accordingly, we adopt our proposal to permit license reaggregation, up to the original geographic size and spectrum band(s) for the type of license, including the three safeguards described above to protect against potential abuses.

106. *Treatment of Existing Waivers Grants or Special Conditions.* In the *FNPRM*, we sought comment on how to treat waivers that have been previously granted, or special conditions applied, to one or more of the authorizations subject to the reaggregation request.¹⁶⁶ RWA argues that, in order to avoid gamesmanship, reaggregated licenses should be controlled by the most restrictive terms and conditions of the sub-licenses.¹⁶⁷ CTIA disagrees, arguing that subdivided licenses that are subject to additional rights,

¹⁶⁰ 47 CFR § 1.929.

¹⁶¹ CTIA Comments at 3-4; Mavenir Comments at 2-3; RWA Comments at 21; T-Mobile Comments at 1-4.

¹⁶² WISPA Reply Comments at 8.

¹⁶³ WISPA Comments at 11.

¹⁶⁴ T-Mobile Comments at 2 (quoting *FNPRM* at 20-21, para. 59); *see also* CTIA Reply Comments at 3; Mavenir Comments at 2.

¹⁶⁵ *See, e.g.*, CTIA Comments at 5.

¹⁶⁶ *FNPRM* at page 21, para. 61.

¹⁶⁷ RWA Comments at 21.

conditions, or parameters should be considered on a case-by-case basis.¹⁶⁸ We find it in the public interest to apply a flexible approach to reaggregation requests that maintains previously granted relief where applicable. We also find, however, that an automatic application of the terms and conditions of an individual license, that may have been subject to waiver relief, to the entire reaggregated license is not warranted absent a separate justification. We will apply special conditions (to reflect prior grant of waiver of application or special conditions) to a reaggregated license as necessary to identify the appropriate type and scope of relief, both spectrally and geographically, applicable to subparts of that license (e.g., variations in transmit power levels, out-of-band emission limits or other technical parameters, or alternative interference protection criteria, for specific spectrum or geographic areas associated with the reaggregated license). Finally, we direct the Bureau to issue a public notice confirming the administrative details of required filings including, for example, the filing method, electronic map format, and applicable fees.¹⁶⁹

II. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

A. ECIP Eligibility Expansion

107. In this *Second Further Notice*, we seek comment on whether to expand eligibility under the small carrier or Tribal Nation transaction prong of the ECIP to other entities. The *Notice* sought comment on the appropriate definition of small carriers and on whether we should consider applying any rule revisions to an expanded class of licensees beyond those Congress required us to consider.¹⁷⁰ The *FNPRM* proposed to adopt the MOBILE NOW Act statutory definition of small carrier for use in the ECIP and sought comment on whether this definition was the correct approach for use in the program.¹⁷¹

108. WISPA proposed an expansion of eligibility, beyond small carriers and Tribal Nations, to include certain non-common carriers in the first transaction prong of the ECIP.¹⁷² We seek comment on whether expanding eligibility using our general Title III powers would advance Congressional and Commission goals of facilitating broad deployment of advanced spectrum-based services. Is there a reason that Congress in the MOBILE NOW Act limited the scope of entities that we were directed to consider to those with common-carrier obligations? If we should expand eligibility beyond that called for in the MOBILE NOW Act, what is the appropriate vehicle for expanding eligibility in the small carrier or Tribal Nation transaction prong of the ECIP? Should we create a distinct eligibility designation for non-common carriers as we have done for Tribal Nations?

109. In considering eligibility expansion, we seek comment on two threshold issues: (1) how to define the specific category of eligible non-common carriers; and (2) what objective measure to determine relative small size is appropriate in this context. WISPA proposed two specific metrics for determining the scope of expansion of eligible entities in the ECIP, including whether an entity: (1) has filed an FCC Form 477¹⁷³ for census blocks that overlap or are adjacent to the license area to be disaggregated,

¹⁶⁸ CTIA Reply Comments at 5.

¹⁶⁹ See, e.g., *Wireline Competition Bureau Provides Guidance to Carriers Receiving Connect America Fund Support Regarding Their Broadband Location Reporting Obligations*, Docket No. 10-90, Public Notice, 31 FCC Rcd 12900 (WCB 2016) (providing guidance PN describing required information and filing parameters to enable carrier compliance with earlier Commission order); *Wireless Telecommunications Bureau To Accept 900 MHz Broadband Segment Applications Beginning May 27, 2021*, Docket No. 21-450, Public Notice, 36 FCC Rcd 7377 (WTB 2021).

¹⁷⁰ *Notice* at 7, para. 20.

¹⁷¹ *FNPRM* at 8, para. 17.

¹⁷² WISPA Comments at 3-5.

¹⁷³ FCC Form 477 collects information about broadband connections to end-user locations, wired and wireless local telephone services, and interconnected Voice over Internet Protocol (VoIP) services. We note that the Commission has established a new Broadband Data Collection (BDC), and that all facilities-based providers of fixed and mobile broadband internet access service must submit broadband availability data through the Broadband Data Collection

(continued....)

partitioned or leased for at least the two calendar years preceding the transaction; and (2) together with its controlling interests, affiliates, and the affiliates of its controlling interests, has fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers.¹⁷⁴ We seek comment on these metrics and whether they strike the appropriate balance in the potential range of expansion, including how these limitations relate to the goals of the program. If not, is there an alternate standard for determining which non-common carriers should be eligible that would achieve the Commission's goals? We note that the Commission has used the 250,000 subscriber benchmark for determining small providers in other contexts, including the issuance of auction bidding credits for rural service providers,¹⁷⁵ and we seek comment on whether subscriber count, as opposed to employee numbers, would be an appropriate measure of size for purposes of participation in ECIP as a small entity.¹⁷⁶ Is there an alternate approach for determining whether a non-common carrier is considered sufficiently small for purposes of ECIP?

110. Are there alternate proposals that we should consider for expanding eligibility to non-common carriers or any other class of users? If commenters believe an alternative proposal merits consideration, they should describe with specificity the precise proposal for expansion of eligibility in the small carrier or Tribal Nation transaction prong, the effects of applying any rule changes to entities that are non-common carriers, whether or not the Commission should adjust rules to better meet the goals in this proceeding of facilitating secondary markets transactions, and the costs and benefits of such an approach.

B. Alternative to Population-Based Construction Requirements

111. In this *Second Further Notice*, we seek further comment on, and propose a structure for, the establishment of an alternate construction requirement and renewal standard for WRS licensees with communications needs less suited to population-based requirements. The *Notice* sought initial comment on a range of issues related to facilitating increased spectrum access and increased availability of telecommunications service in rural areas.¹⁷⁷ The *FNPRM* sought more detailed input on providing all WRS flexible use licensees an alternative to population-based requirements, noting that commenters

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no later than September 1, 2022 for the initial filing and bi-annually thereafter. See *Broadband Data Task Force and Office of Economics and Analytics Announce Inaugural Broadband Data Collection Filing Dates*, WC Docket Nos. 19-195, 11-10, Public Notice, DA 22-182, at 9, para. 22 (OEA Feb. 22, 2022). As a result of the BDC, the Commission has contemplated sunseting the fixed broadband deployment aspect of FCC Form 477. See *Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program*, WC Docket Nos. 19-195, 11-10, Third Report and Order, 36 FCC Rcd 1126, 1188-1189, paras. 159-160 (2021).

¹⁷⁴ WISPA *Notice* Comments at 6; reiterated in WISPA Comments at 5.

¹⁷⁵ The Commission has previously used the 250,000 subscriber benchmark as evidence of being a small communications provider. See *Small Business Exemption from Open Internet Enhanced Transparency Requirements*, GN Docket No. 14-28, Order, 32 FCC Rcd 1772, 1772, para. 1 (2017) (“grant[ing] a [small business] waiver . . . for BIAS providers with 250,000 or fewer broadband connections”). The House and the Senate Committee on Commerce, Science and Transportation have also passed bills using the 250,000 subscriber benchmark to designate small broadband providers. See *Small Business Broadband Deployment Act*, H.R. 4596, 114th Cong. § 2(d)(2) (2016); *Small Business Broadband Deployment Act*, S. 2283, 114th Cong. § 2(a)(4). The Commission has also used the 250,000 subscriber benchmark as a metric for entities to qualify for the rural service provider bidding credit. See 47 CFR § 1.2110(f)(4)(i) (having less than 250,000 subscribers is one of the requirements for the rural service provider bidding credit); *Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, Report and Order, 30 FCC Rcd 7493, 7534-7535, para. 98 (2015) (“fewer than 250,000 combined subscribers . . . should encompass carriers that provide a variety of services to rural areas, while excluding larger entities”).

¹⁷⁶ Typically, absent Small Business Administration approval for a different size standard, the Commission would consider a wireless provider to be small if it has 1,500 or fewer employees. See 13 CFR § 121.201, NAICS Code 517312.

¹⁷⁷ *Notice*, 34 FCC Rcd at 1763-64, paras. 14-19.

generally were supportive of possible benefits of modified construction requirements,¹⁷⁸ and specifically sought comment on use cases where meeting population coverage requirements presents challenges, such as critical infrastructure, Internet of Things applications, and other private internal uses.¹⁷⁹

112. In most auctioned flexible services, licensees are required to meet population coverage performance benchmarks at an interim and final stage, which results in not having to provide signal coverage and service over the entire geographic area of the license. We again note that the Commission has departed from providing the “substantial service” option that was available to many licensees as an alternative to population coverage in certain services,¹⁸⁰ in large part because the subjective nature of the term “substantial” created uncertainty over both its fulfillment and enforcement. Commenters generally supported adoption of alternate requirements that were flexible and tailored to the unique needs and challenges of the applicable geographic area or entity,¹⁸¹ but advanced limited specific proposals beyond advocating a metric of less than 100 percent coverage. Additionally, while the record puts forward various general safe-harbor proposals, none of these proposals provide more certainty or objectivity than the “substantial service” standard.¹⁸² To facilitate industry-requested regulatory certainty, we propose through this *Second Further Notice* a framework and seek further comment on specific details and potential real-world application of an alternative safe harbor and appropriate metrics that will balance the industry’s desire for certainty while not resulting in spectrum lying fallow.

113. *Alternate Requirement for Private Networks.* We note that commenters described the need for alternative requirements in cases where a licensee is putting spectrum to use for private, internal radio communications associated with its business functions.¹⁸³ In these instances, the geographic area of the license is generally more expansive than the desired area of operation.¹⁸⁴

114. We acknowledge that, in either of these circumstances, a population-based construction metric might not align with the intended area of operation or could make it extremely difficult to meet population coverage requirements. In addition, such licensees would need to meet not only construction requirements in the initial license term, but also the renewal requirements. In cases where licenses are obtained in the secondary market, renewal safe harbors may not be available to this type of licensee, potentially resulting in a chilling of potential transactions based on the uncertainty as to whether renewal obligations can be met.

115. We recognize that an alternative approach may benefit parties acquiring a license in the secondary market, which in many cases might occur after an interim performance benchmark is met, but prior to the end of term performance benchmark and/or renewal deadline. Clearly, however, such regulatory relief might also be needed for licenses acquired prior to an interim performance deadline or

¹⁷⁸ See, e.g., WISPA Reply at 5; WISPA Comments at 8; NRECA Comments at 6; DSA Comments at 4; NTCA Comments at 2-4; API Comments at 2; R Street Comments at 3.

¹⁷⁹ *FNPRM* at 17-19, sec. III.D.

¹⁸⁰ *FNPRM* at 18, para. 53 & n.74, noting WRS that do not provide a substantial service option in lieu of either meeting performance requirements based on population-based metrics or a number of fixed links per a population figure for fixed operations.

¹⁸¹ See CTIA Comments at 2, 10-12; EWA Comments at 4; NWCC Comments at 2-3; T-Mobile Comments at 8; USCC Comments at 2-3; UTC Comments at 9-10; WISPA Comments at ii, 9-10, 12-13.

¹⁸² See, e.g., EWA Comments at 4-5 (advocating subjective “productive use” standard); T-Mobile Comments at 8 (supporting a safe harbor but without offering definitions); Mavenir Comments at 5-6 (supporting ORAN safe harbor only);

¹⁸³ See, e.g., CTIA Comments at 2, 11; EWA Comments at 4; NWCC Comments at 2-3.

¹⁸⁴ See UTC Reply Comments at 6 (noting that “the coverage requirements of critical infrastructure entities rarely conform to the relatively large licensing areas sold in auctions, and even counties, the smallest geographic component used by the FCC, often encompass more geography than needed for private wireless users. . .”).

for initial licenses acquired at auction by a licensee intending to use spectrum to meet private, internal communication needs. Accordingly, to allow those licensees seeking to provide service to meet private communications needs, we propose, and seek further comment on, an alternate, demand-based construction requirement. We also propose to modify our renewal safe harbor to include “demand-based initial construction.” We propose that, to meet the alternate construction requirement and to qualify for the modified renewal safe harbor, the licensee must show that its licensed area is entirely covered through the sum of the following three zones: a core usage zone, an expansion zone, and a protection zone.

116. We propose that the network must include a core usage zone where all the spectrum is actively used to meet private, internal communications needs. We expect that the licensed area subject to an alternative benchmark will vary in size, depending on, for example, whether the license was acquired through auction or through partition and/or disaggregation. We thus do not propose a standard minimum or maximum size for this core usage area, consistent with our goal of permitting each entity the flexibility to define the usage area tailored to its specific needs. We seek comment, however, on how best to delineate the appropriate size of a core area in order to guard against inefficient spectrum use or warehousing. Should the core area consist of a minimum percentage of the overall licensed area? Are there other minimum metrics we could set to achieve Commission goals? We also seek comment on whether to adopt a minimum signal level or other requirements to define this core usage area. Are there other minimum requirements that we should impose to delineate the core area of operations? Is it most efficient for licensees to provide maps and engineering showings confirming where the spectrum is in use, or should licensees define this area using other methods when making a certification to the Commission?

117. We also propose that licensees define an expansion zone into which the usage area may extend in the future or certify that they do not require such a zone based on network plans. Given the goals of this proceeding, we propose that this zone would be a nominal area, and seek comment on how to define this area in a way that avoids spectrum warehousing. How should the Commission evaluate the permissible size and boundaries of this area to avoid potential abuse, while permitting flexibility to account for expansion to meet future business communications needs? Should there be additional certifications, notices, or deadlines for the usage of a defined expansion area? Commenters should provide specific metrics where possible to describe how the Commission should define the expansion zone to best achieve our goal of providing certainty, while maintaining licensee flexibility. For both the core and expansion zones, we seek additional comment on whether to establish deadlines for licensees to meet their usage obligations in these respective zones. Should licensees be required within a certain period of time to complete core and expansion construction? What is the appropriate timeframe for construction of each of these areas to ensure that licensees are carrying out core operations and expansion plans in these respective zones?

118. Finally, we propose that licensees should be given flexibility to define a reasonable protection zone surrounding the core usage and expansion zones, up to the license boundary, in order to provide interference protection, consistent with the established service rule-based protection criteria, for the licensee and neighboring licensees. This approach would allow licensees greater flexibility to place transmitters according to business needs without having to provide commercial-grade signal coverage at the very edge of their license boundary. We note that this is the same flexibility provided today in radio services that require coverage of a population percentage within the licensed area, not coverage to the entire licensed area. We clarify, however, that licensees operating under this proposed framework would nonetheless be required to meet the applicable co-channel and adjacent channel protection criteria set forth in the relevant radio service rules (e.g., a signal strength at the boundary, or maintaining a service/interfering contour). We seek comment on how best to define this protection area, including addressing how any definition would continue to protect for system expansion. In particular, we ask commenters to provide input regarding how the appropriate size of any protection area relates to promoting spectrum use in the core and expansion usages area, while not resulting in spectrum hoarding in a licensed area.

119. We believe the alternative standard should be codified in part 1 of our rules, within the existing renewal standard.¹⁸⁵ We seek comment, however, on the most appropriate location for these proposed rule changes. Are Commission rule sections 1.949 and 1.950¹⁸⁶ the appropriate place to amend our performance rules to facilitate administrative ease without creating confusion for licensees over Commission requirements? In the alternative, rather than creating a general rule applicable to all WRS licensees, regardless of spectrum band, should we amend our rules for affected services with a service-specific exception?

120. Similarly, and given that the current technical standards and protections at the boundary of a partitioned or disaggregated license are service-specific, we seek comment on whether to consider changes to any of these rules for ECIP licensees in particular. Are the current protections adequate for the types of licensees we consider here? What changes, if any, should the Commission consider in order to allow these networks to meet construction requirements yet avoid harmful interference?

121. *Alternate Use or Share Safe Harbor.* Commenters note the existence of a variety of enterprises in rural areas that serve critical industries and locations, such as hospitals, school campuses, public safety facilities, and mining and farming concerns.¹⁸⁷ Some commenters argue that, given the nature of private enterprise networks, the construction and renewal requirements could be fulfilled as long as licensees make use of the spectrum to meet communications needs at any place within the geographic license area, regardless of population or geographic coverage.¹⁸⁸ We find this standard to be overbroad and contrary to the goals of this proceeding, as it could incentivize spectrum warehousing and result in transactions for areas substantially larger than required to meet an entity's communications needs.

122. We seek comment instead on a "use or offer to share" safe harbor metric for renewal and construction that acknowledges the needs of these types of networks and would facilitate spectrum use. Under this approach, to meet the safe harbor, the licensee would show that: (1) it is using the spectrum in order to meet a private internal need within the licensed area, and (2) it has an ongoing public offering to sell or lease any unused geographic area under reasonable terms and conditions.

123. We seek comment on specific definitions of the relevant terms and concepts within such a safe harbor. For example, how should the Commission determine whether the terms and conditions are reasonable? Are there specific additional ways to prevent warehousing within this standard? Do commenters believe that this type of standard would continue to allow spectrum warehousing and abuse? Is it more efficient to require return of unused spectrum to Commission inventory for re-licensing, rather than allowing such a safe harbor? Commenters are encouraged to discuss how this proposal could incentivize deployment and spectrum use by the types of private networks for which alternative metrics are needed. We also seek comment on the costs and benefits of the proposals advanced above and any alternatives raised by commenters.

C. Other Efforts to Promote Digital Equity and Inclusion

124. Finally, the Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

¹⁸⁵ 47 CFR §§ 1.949, 1.950.

¹⁸⁶ *Id.* §§ 1.949, 1.950.

¹⁸⁷ CTIA Comments at 2, 12; EWA Comments at 4-5; UTC Reply Comments at 4.

¹⁸⁸ CTIA Comments at 2, 11; EWA Comments at 4.

III. PROCEDURAL MATTERS

125. *Paperwork Reduction Analysis.* This *Report and Order* may contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law No. 104-13. All such new or modified information collection requirements will be submitted to the Office of Management and Budget for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on any new information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 47 U.S.C. § 3506(c)(4), we asked for specific comment on how we might further reduce the information *collection* burden for small business concerns with fewer than 25 employees in the *FNPRM*,¹⁸⁹ and we received no comment.

126. This Second Further Notice of Proposed Rulemaking may contain proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on any information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

127. *Congressional Review Act.* [The Commission will submit this draft *Report & Order and Second Further Notice of Proposed Rulemaking* to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, for concurrence as to whether this rule is “major” or “non-major” under the Congressional Review Act, 5 U.S.C. § 804(2).] The Commission will send a copy of this *Report & Order and Second Further Notice of Proposed Rulemaking*, to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

128. *Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980, as amended (RFA),¹⁹⁰ requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”¹⁹¹ Accordingly, we have prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the possible impact of the rule changes contained in the *Report and Order* on small entities. The FRFA is set forth in Appendix B. We have also prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning the possible impact of the rule changes contained in the *Second Further Notice of Proposed Rulemaking* on small entities. The IRFA is set forth in Appendix C.

129. *Ex Parte Presentations.* The proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must: (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission

¹⁸⁹ *FNPRM* at 23, para. 67.

¹⁹⁰ *See* 5 U.S.C. §§ 601–612. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹⁹¹ *Id.* § 605(b).

staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

130. In light of the Commission's trust relationship with Tribal Nations and our commitment to engage in government-to-government consultation with them, we find the public interest requires a limited modification of the *ex parte* rules in this proceeding.¹⁹² Tribal Nations, like other interested parties, should file comments, reply comments, and *ex parte* presentations in the record to put facts and arguments before the Commission in a manner such that they may be relied upon in the decision-making process consistent with the requirements of the Administrative Procedure Act.¹⁹³ However, at the option of the Tribal Nation, *ex parte* presentations made during consultations by elected and appointed leaders and duly appointed representatives of federally recognized Indian Tribes and Alaska Native Villages to Commission decision makers shall be exempt from the rules requiring disclosure in permit-but-disclose proceedings¹⁹⁴ and exempt from the prohibitions during the Sunshine Agenda period.¹⁹⁵ To be clear, while the Commission recognizes consultation is critically important, we emphasize that the Commission will rely in its decision-making only on those presentations that are placed in the public record for this proceeding.

131. *Comment Period and Filing Procedures.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). Commenters should refer to WT Docket No. 19-38 when filing in response to this *Second Further Notice of Proposed Rulemaking*.

- Electronic filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper filers: Parties who choose to file by paper must file an original and one copy of each filing.
- All Filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
 - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
 - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L St NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (2020), <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.

¹⁹² 47 CFR § 1.1200(a).

¹⁹³ 5 U.S.C. §§ 551 *et seq.*

¹⁹⁴ *See generally* 47 CFR § 1.1206.

¹⁹⁵ 47 CFR § 1.1203.

- During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.
- After COVID-19 restrictions are lifted, the Commission has established that hand-carried documents are to be filed at the Commission's office located at 9050 Junction Drive, Annapolis Junction, MD 20701. This will be the only location where hand-carried paper filings for the Commission will be accepted.¹⁹⁶

132. *People with Disabilities.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice).

133. *Additional Information.* For additional information on this proceeding, contact Katherine Nevitt of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418-0638 or Katherine.Nevitt@fcc.gov.

IV. ORDERING CLAUSES

134. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 303, and 310(d) of the Communications Act of 1934, as amended, and section 616 of the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act, 47 U.S.C. §§ 151, 154(i), 303, 310(d), 1506, that this *Report and Order and Second Further Notice of Proposed Rulemaking* is HEREBY ADOPTED, and, except as otherwise provide below, is effective thirty days from the date of publication of each respective component in the Federal Register.

135. IT IS FURTHER ORDERED that the amendments of the Commission's rules as set forth in Appendix A ARE ADOPTED, effective thirty days from the date of publication in the Federal Register, with the exception of those rules that may contain new or modified information collection requirements that require review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The Commission directs the Wireless Telecommunications Bureau to establish and announce the effective date of rules requiring PRA approval in a document published in the Federal Register after such OMB review as may be required.

136. IT IS FURTHER ORDERED that, pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415 and 1.419, interested parties may file comments on the *Second Further Notice of Proposed Rulemaking* on or before 30 days after publication in the Federal Register, and reply comments on or before 60 days after publication in the Federal Register.

137. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order and Second Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

138. IT IS FURTHER ORDERED that the Office of the Managing Director, Performance Evaluation and Records Management, SHALL SEND a copy of this *Report and Order and Second Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

¹⁹⁶ See *Amendment of the Commission's Rules of Practice and Procedure*, Order, 35 FCC Rcd 5450 (OMD 2020).

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

The Federal Communications Commission proposes to amend 47 CFR part 1 as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for part 1 continues to read as follows:

AUTHORITY: [To be inserted after Federal Register publication]

2. Amend § 1.929 by adding paragraph (a)(7) to read as follows:

§ 1.929 Classification of filings as major or minor.

* * * * *

(a)

* * * * *

(7) Application for reaggregation of licenses pursuant to § 1.950.

3. Amend § 1.948 by adding paragraph (j)(2)(i)(D) to read as follows:

§ 1.948 Assignment of authorization or transfer of control, notification of consummation.

* * * * *

(j)

* * * * *

(2)

* * * * *

(i)

* * * * *

(D) The application does not involve a transaction in the Enhanced Competition Incentive Program (see subpart EE of this part).

* * * * *

4. Amend § 1.950 by

a. Revising the heading of paragraph (c) and

b. Adding paragraph (i):

The additions and revisions read as follows:

§ 1.950 Geographic partitioning and spectrum disaggregation.

* * * * *

(c) Filing requirements for partitioning and disaggregation.

* * * * *

(i) Reaggregation of licenses.

(1) A licensee may apply to reaggregate multiple licenses that were previously disaggregated or partitioned pursuant to this section.

- (2) Eligibility for reaggregation.
 - (i) All licenses to be reaggregated must be of the same radio service, and have the same market and channel block.
 - (ii) Each license to be reaggregated must have met all applicable performance requirements, including any interim and final requirements, prior to the certification filing.
 - (iii) Each license to be reaggregated must have been renewed for at least one license term since the applicable performance requirements were met.
 - (iv) None of the licenses for which an applicant seeks reaggregation have violated the Commission’s permanent discontinuance rules, as applicable to that license.
 - (v) Licenses may be reaggregated in any combination up to, but not exceeding, the original geographic size and/or spectrum band(s) for the type of Wireless Radio Service license at issue (i.e., a licensee may, but is not required, to reaggregate all licenses which were once part of the original license).

- (3) Procedural requirements.
 - (i) Applications to reaggregate licenses shall be made as a major modification request using FCC Form 601 and follow the filing requirements described in §1.913, §1.929, and § 1.947.
 - (ii) An application to reaggregate licenses shall include a compliance attachment that certifies the licenses meet the eligibility requirements of § 1.950(i)(2)(i-iv).
 - (iii) An application to reaggregate license shall also include as attachments the following:
 - (A) An electronic map and a table that together identify all licenses to be aggregated and identify the composite license requested.
 - (B) A confirmation that all licenses in the reaggregation request are active and are held under the same FCC Registration Number at the time of filing.
 - (C) A per-license list of all special conditions and a statement of understanding that the listed special conditions will continue to apply to that portion of the reaggregated license with respect to the spectrum and/or geography at issue, as if the license had not been reaggregated.
 - (D) A per-license list of all waivers granted and a statement of understanding that the listed waiver(s) do not automatically convey to any other portion of the reaggregated license. If applicable, the applicant shall include a statement indicating that it is separately seeking waiver relief where it has filed a waiver request seeking to expand the scope of previously-granted relief.

5. Amend § 1.9020 by adding paragraph (2)(i)(D) to read as follows:

§ 1.9020 Spectrum manager leasing arrangements.

* * * * *

(e)

* * * * *

(2)

* * * * *

(i)

* * * * *

(D) The application does not involve a transaction in the Enhanced Competition Incentive Program (see subpart EE of this part).

* * * * *

6. Amend § 1.9030 by adding paragraph (e)(2)(i)(D) to read as follows:

§ 1.9030 Long-term de facto transfer leasing arrangements.

* * * * *

(e)

* * * * *

(2)

* * * * *

(i)

* * * * *

(D) The application does not involve a transaction in the Enhanced Competition Incentive Program (see subpart EE of this part).

* * * * *

7. Amend part 1 by to adding a new subpart EE to read as follows:

PART 1 – PRACTICE AND PROCEDURE

* * * * *

Subpart EE – Enhanced competition incentive program

Sec.1.60000 Purpose.

Sec. 1.60001 Definitions.

Sec. 1.60002 Application requirements for program participation.

Sec. 1.60003 Small carrier or tribal nation transaction prong.

Sec. 1.60004 Rural-focused transaction prong.

Sec. 1.60005 Program Benefits.

Sec 1.60006 Program obligations.

Sec. 1.60007 Penalties.

§ 1.60000 Purpose.

The purpose of this subpart is to implement the Enhanced Competition Incentive Program (ECIP), a program designed to incentivize Qualifying Transactions in the Wireless Radio Services to increase spectrum access for small carriers and Tribal Nations and to increase competition, and also facilitate the provision of advanced telecommunications services in rural areas by eligible entities.

§ 1.60001 Definitions.

The following definitions are applicable to the ECIP.

- (a) Affiliate. A person holding an attributable interest in an applicant if such individual or entity:
- (1) directly or indirectly controls or has the power to control the applicant; or
 - (2) is directly or indirectly controlled by the applicant; or
 - (3) is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant; or
 - (4) has an “identity of interest” with the applicant.

Note 1 to paragraph (a): See § 1.2110 and § 1.2112(a)(1) through (7) for further clarification on determining affiliation.

(b) Qualifying transaction. A transaction between unaffiliated parties involving a partition and/or disaggregation, long-term leasing arrangement, or full assignment that meets the requirements of either the small carrier or Tribal Nation transaction prong pursuant to § 1.60002 or the rural-focused transaction prong pursuant to § 1.60003.

(c) Qualifying geography. Qualifying Geography is the minimum geography threshold required for the rural-focused transaction prong.

(d) Rural area. Rural area is any area except:

(1) A city, town, or incorporated area that has a population of more than 20,000 inhabitants; or

(2) An urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants.

(e) Small carrier. A small carrier is a carrier, defined as any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy in section 3 of the Communications Act of 1934 (47 U.S.C. 153)), that:

(1) Has not more than 1,500 employees (as determined under § 121.106 of title 13, Code of Federal Regulations, or any successor thereto); and

(2) Offers services using the facilities of the carrier.

(f) Transaction geography. Transaction Geography is the total geography included in a Qualifying Transaction.

(g) Tribal nation. A Tribal Nation is any federally-recognized American Indian Tribes and Alaska Native Villages, the consortia of federally recognized Tribes and/or Native Villages, and other entities controlled and majority-owned by such Tribes or consortia.

§ 1.60002 Application requirements for program participation.

Applicants seeking to participate in the ECIP must submit an application on FCC Form 603 or 608, as applicable, to the Wireless Telecommunications Bureau for review and approval that details a Qualifying Transaction through a partition and/or disaggregation pursuant to § 1.950, a full assignment pursuant to § 1.948, a long-term spectrum manager lease arrangement pursuant to § 1.9020, or a long-term de facto transfer lease arrangement pursuant to § 1.9030, and that:

- (a) Designates that the Qualifying Transaction identified in the application seeks consideration under the ECIP;

- (b) Selects the prong applicable to its Qualifying Transaction, either § 1.60003 or § 1.60004, but not both, even if a party to the transaction is eligible under both prongs, and demonstrates that the applicants meet each requirement thereunder;
- (c) Demonstrates that the applicants to the Qualifying Transaction are unaffiliated and provides a list of all affiliated entities for each party to the transaction;
- (d) Includes a certification that the applicants to the Qualifying Transaction are not barred from the ECIP pursuant to § 1.60007;
- (e) Includes a certification that the license(s) included in the application have not previously received benefits under the ECIP pursuant to § 1.60005(e);
- (f) Includes a certification that the applicants entered into the Qualifying Transaction in good faith and that the licensee/lessor reasonably believes the assignee/lessee has the resources and a bona fide intent to meet the program's obligations;
- (g) Includes a certification that the assignor or lessor either did not confer any benefit (monetary or otherwise) to the assignee or lessee as consideration for entering into the proposed ECIP transaction or, if benefits were conferred to the assignee or lessee, the application must include a narrative with a detailed description of any benefits so conferred by the assignor or lessor to the assignee or lessee, respectively; and
- (h) Establishes that any lease arrangement entered into for purposes of ECIP participation is for a minimum term of five (5) years, whether a long-term de facto transfer lease arrangement or a long-term spectrum manager lease arrangement.

§ 1.60003 Small carrier or tribal nation transaction prong.

- (a) *Eligibility.* The following parties are eligible to participate through a Qualifying Transaction under the small carrier or Tribal Nation transaction prong of the ECIP: an assignor that is a covered geographic licensee as defined under § 1.907; a lessor in an included service as set forth in § 1.9005 that is also a covered geographic licensee as defined under § 1.907; and an unaffiliated assignee or unaffiliated lessee that is a small carrier or a Tribal Nation as defined in this subpart, except that a transaction shall not be eligible for participation in the ECIP under this prong if it includes either: (1) a license(s) with existing shared construction obligations pursuant to § 1.950(g); (2) an application to participate in ECIP that includes an election from the parties to share construction obligations pursuant to § 1.950(g); (3) a light-touch leasing spectrum manager lease arrangement(s) of 3.5 GHz Priority Access Licenses in the Citizens Band Radio Service; or (4) an application to participate in ECIP that includes a barred party pursuant to § 1.60007.
- (b) *Qualification requirements.* An applicant in a Qualifying Transactions under the small carrier or Tribal Nation transaction prong must demonstrate that:
 - (1) The ECIP transaction involving a disaggregation, partition/disaggregation in combination, full license assignment, or a lease, includes a minimum of 50% of the licensed spectrum, and meets the minimum spectrum threshold at every point in the Transaction Geography (where the percentage is calculated at any point as the amount of spectrum being assigned/leased (in megahertz)/total spectrum held under the license (in megahertz);
 - (2) The ECIP transaction involving a partition, partition/disaggregation in combination, full license assignment, or a lease, includes a minimum geography of 25% of the total licensed area for licenses with a licensed area that contains 30,000 square miles or less, or a minimum geography of 10% of the total licensed area for licenses with a licensed area 30,001 square miles or larger;

- (3) If applicable, the minimum term of a long-term spectrum manager lease or *de facto* transfer lease is at least five (5) years; and
- (4) The ECIP transaction was entered into in good faith with a bona fide intent by all parties to meet the program's obligations.
- (c) *Multiple contributing licenses.* A Qualifying Transaction between unaffiliated parties under the small carrier or Tribal Nation transaction prong may be either by an assignment (full, partition and/or disaggregation) or a lease, but not both. Where multiple licenses are included in the Qualifying Transaction under this prong, each license shall be considered separately and must independently meet the respective minimum spectrum and geography thresholds in paragraph (b) of this rule.

§ 1.60004 Rural-focused transaction prong.

- (a) *Eligibility.* The following parties are eligible to participate through a Qualifying Transaction under the rural-focused transaction prong of the ECIP: an assignor that is a covered geographic licensee as defined by § 1.907; a lessor in an included service as set forth in § 1.9005 that is also covered geographic licensees as defined by § 1.907; and an unaffiliated assignee or lessee that commits to meeting the requirements of the rural-focused transaction prong, except that a transaction shall not be eligible for participation in the ECIP under this prong if it includes either: (1) a license(s) with existing shared construction obligations pursuant to § 1.950(g); (2) an application to participate in ECIP that includes an election from the parties to share construction obligations pursuant to rule § 1.950(g); or (3) a light-touch leasing spectrum manager lease arrangement(s) of 3.5 GHz Priority Access Licenses in the Citizens Band Radio Service.
- (b) *Qualification requirements.* An applicant in a Qualifying Transaction under the rural-focused transaction prong must demonstrate that:
 - (1) The ECIP transaction involving a disaggregation, partition/disaggregation in combination, or a lease, includes a minimum of 50% of the licensed spectrum, and meets the minimum spectrum threshold at every point in the Transaction Geography (where the percentage is calculated at any point as the amount of spectrum being assigned/leased (in megahertz)/total spectrum held under the license (in megahertz); and
 - (2) The minimum Qualifying Geography threshold of exclusively rural area is included in the application based on the following scaled categories:
 - (i) 300 contiguous square miles for licenses with licensed area containing up to 30,000 square miles;
 - (ii) 900 contiguous square miles for licenses with licensed area containing between 30,001-90,000 square miles;
 - (iii) 5,000 contiguous square miles for licenses with licensed area containing between 90,001-500,000 square miles; or
 - (iv) 15,000 contiguous square miles for licenses with licensed area containing 500,001 square miles or more.
 - (3) If applicable, the minimum term of a long-term spectrum manager lease or *de facto* transfer lease is at least five (5) years; and
 - (4) The ECIP transaction was entered into in good faith with a bona fide intent by all parties to meet the program's obligations.
- (c) *Multiple contributing licenses.* Qualifying Transactions between unaffiliated parties under the rural-focused transaction prong must specify at least one area of Qualifying Geography,

where one or more licenses may contribute, via any combination of full assignment, partitioning and/or disaggregation, and/or lease(s), provided the Qualifying Geography intersects each contributing license included in the underlying application. Where multiple licenses with different size licensed areas are included in the Qualifying Transaction and each contributes to the Qualifying Geography, the Qualifying Geography must consist of the minimum geographic threshold applicable to the contributing license with the greatest square mileage in its licensed area.

§ 1.60005 Program benefits.

(a) *Program Benefits.* Upon Commission approval of an application for a Qualifying Transaction in ECIP filed pursuant to § 1.60002, the following benefits shall be conferred as specified:

(1) *License term extension.* All parties to a partition and/or disaggregation Qualifying Transaction; the lessor entering into a spectrum lease arrangement Qualifying Transaction; and the assignee in a full license assignment Qualifying Transaction, shall receive a five-year license term extension on the license(s) subject to the application..

(2) *Construction extension.* All parties to a partition and/or disaggregation Qualifying Transaction; the lessor entering into a spectrum lease arrangement Qualifying Transaction; and the assignee in a full license assignment Qualifying Transaction, shall receive a one-year construction extension of both the interim and final performance requirement deadline, where applicable, on the license(s) subject to the application. Where the Commission has previously extended a performance requirement deadline on the license(s) and that deadline has not passed, the one year extension conferred through ECIP is in addition to the prior extension, provided the extension that was previously granted, whether by rule or through waiver, is transferrable, and the assignee separately justifies such relief if required.

(3) *Substitution of alternative construction requirement benefit.* Assignee in a qualifying partition, combination partition disaggregation transaction, or full license assignment filed under the rural focused-transaction prong, shall be subject to the alternative construction requirement set forth in rule § 1.60006 in lieu of any applicable service-based performance requirement for the license(s) resulting from an ECIP transaction.

(b) *Limitation on duplicative benefits.*

(1) A license included in a Commission approved Qualifying Transaction in the ECIP shall be eligible for program benefits a single time per license for the license term and all subsequent renewal terms.

(2) Any license, including a resulting license from a partition and/or disaggregation, previously included in a Qualifying Transaction approved by the Commission in the ECIP shall be ineligible to receive benefits in any subsequent ECIP transaction, regardless of whether or not the current licensee was the beneficiary in the original Qualifying Transaction.

§ 1.60006 Program obligations.

(a) *Compliance with requirements under selected prong.* An assignee or lessee must comply with the requirements of either the small carrier or Tribal Nation transaction prong in § 1.60003 or the rural-focused transaction prong in § 1.60004, as selected, and is not permitted to change prongs after the consummation of the Commission approved assignment application, grant of a de facto transfer lease application, or acceptance of a spectrum manager lease application for a Qualifying Transaction in ECIP.

(b) *Construction requirement for rural-focused transaction assignees.* Assignees shall be subject to the following construction requirements for resulting license(s) granted in a Commission approved Qualifying Transaction through partition, a combination partition/disaggregation, or full license assignment filed under the rural-focused transaction prong in ECIP, which supersedes any service-based requirement:

- (1) The assignee must construct and operate, or provide signal coverage and offer service to, 100% of the Qualifying Geography on the license(s) granted under the ECIP.
- (2) The construction period is the applicable construction deadline identified on the license(s), as extended by § 1.60005. If no such deadline remains for the license(s), the assignee must construct and operate, or provide signal coverage and offer service to, 100% of the Qualifying Geography no later than two (2) years after the consummation of the Commission approved application.
- (3) Where the assignee is subject to both an interim and final performance benchmark, the performance requirements in this paragraph shall replace the interim performance benchmark and the assignee shall not be subject to a final performance requirement. Where the assignee has only a remaining final performance requirement, the performance requirements in this paragraph shall replace the final benchmark.
- (4) All end user devices throughout the Qualifying Geography must be capable of operation on all spectrum bands associated with license(s) that contribute to the Qualifying Geography.
- (5) Consistent with § 1.946(d), notification of completion of construction must be provided to the Commission through the filing of FCC Form 601, no later than 15 days after the applicable construction deadline or the expiration of the two (2) year period in subsection (2).

(c) *Operational requirement for rural-focused transaction assignees.* Assignees in a Commission approved rural-focused transaction pursuant to § 1.60004 are subject to the following operational requirements:

- (1) Assignees must construct and operate in, or provide signal coverage and offer service to, 100% of the Qualifying Geography identified in their Commission approved Qualifying Transaction for a period of at least three (3) consecutive years;
- (2) Operation or service must not fall below that used to meet the construction requirement in subpart (a) for the entire three (3) year period;
- (3) Assignees must construct and operate, or provide signal coverage and offer service, as required pursuant to paragraph (b), by the applicable construction deadline identified on the license(s), as extended by § 1.60005. Where no such deadline remains for the license(s), the three (3) year continuous operational requirement must commence no later than two (2) years after the consummation of the Commission approved application filed pursuant to § 1.60002.

(d) *Construction and operational requirements for rural-focused transaction leases.* Lessees must construct and operate, or provide signal coverage and offer service to, 100% of the Qualifying Geography identified in the underlying Qualifying Transaction that was the basis for Commission approval in the ECIP. Lessees must meet this requirement no later than two (2) years after grant of the underlying de facto transfer lease application or acceptance of the underlying spectrum manager lease application, and must maintain operation for a period of at least three (3) consecutive years during any period within the initial minimum required five (5) year lease term.

(e) *Operational Requirement Notifications.* Assignees and lessees of rural-focused transactions pursuant to § 1.60004 must file the following notifications to demonstrate compliance with the requirements in subsections (a) through (c):

(1) **Initial Operational Requirement Notification.** Assignees and lessees must file an initial operational notification with the Commission within 30 days of the commencement of operations that: (i) provides the date operations began; (ii) certifies that the operational requirement of 100% coverage of the Qualifying Geography for that license or lease has been satisfied; and (3) provides technical data demonstrating such compliance.

(2) **Final Operational Requirement Notification.** Assignees and lessees must file a final operational notification requirement with the Commission within 30 days of completion of the three consecutive year operational requirement that: (i) certifies that the operational requirement of 100% coverage of the Qualifying Geography for three (3) consecutive years has been satisfied; (ii) provides the date the three (3) year period was completed; and (iii) provides technical data demonstrating the coverage provided during the three year period.

(f) *Holding period.* Assignees and lessees participating in ECIP under either the small carrier or Tribal Nation transaction prong set forth in § 1.60003 or the rural-focused transaction prong set forth in § 1.60004 must comply with the following obligations:

(1) **Assignees.** An assignee of a license(s) granted in a Qualifying Transaction involving a partition and/or disaggregation or full assignment is required to hold any such license(s) for a period of at least five (5) years, commencing upon the consummation date of the Commission approved application filed pursuant to § 1.60002. During this holding period, except as provided in subsection (e), the license(s) received through ECIP is not permitted to be further partitioned, disaggregated, assigned or leased.

(2) **Lessees.** Lease arrangements subject to the ECIP shall not be terminated by either lessor or lessee prior to the expiration of the five (5) year term required by § 1.60003(b)(3) or § 1.60004(b)(3), where applicable, and, except as provided in (e) of this subsection, may not be transferred or subleased to another party during the five (5) year term.

(3) **Rural-focused transaction assignees.** Any license(s) resulting from a Qualifying Transaction under the rural-focused transaction prong pursuant to § 1.60004 may not be subsequently assigned (partition and/or disaggregation or full assignment), leased or transferred until the following conditions have been met:

(i) The license(s) has been held by the assignee of the Qualifying Transaction for a period of at least five (5) years commencing on the date of consummation of the Commission approved application filed pursuant to § 1.60002; and

(ii) The construction and operational requirements pursuant to paragraphs (a) through (d), where applicable, have been satisfied.

(g) *Exceptions.* The requirements in paragraphs (a) through (e) do not apply to pro forma transfers pursuant to § 1.948(c)(1), and do not apply to any area of the Transaction Geography and/or Qualifying Geography, which is covered by a lease or sublease entered into for the purpose of enabling a Contraband Interdiction System (as defined in § 20.30).

§ 1.60007 Penalties.

(a) *Automatic termination.* A license(s) resulting from a Qualifying Transaction in the ECIP shall be automatically terminated without specific Commission action or further notice to the licensee, superseding any service-based penalty, if the assignee/licensee fails to comply with any of the following:

(1) The five (5) year holding period pursuant to § 1.60006(e);

(2) The construction requirement pursuant to § 1.60006(a) or (c) or any applicable service-based performance requirement, where applicable; or

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- (3) The operational requirements pursuant to § 1.60006(b) or (c), where applicable;
- (b) *Bar from future program participation.* A party participating in a Commission approved Qualifying Transaction in the ECIP shall be prohibited from future participation in the ECIP where it is found that it:
- (1) Violated the five (5) year holding period requirements of § 1.60006(e), including premature termination of a lease or entering into a sublease in violation of § 1.60006(e)(i), if applicable;
- (2) Failed to meet the construction requirement of § 1.60006(a) or (c), or any applicable service-based performance requirement, where applicable;
- (3) Failed to meet the operational requirements of § 1.60006(b) or (c), where applicable; or
- (4) Entered into a bad faith transaction in violation of § 1.60003(b)(4) or § 1.60004(b)(4).
- (c) *Effect of program bar.*
- (1) A program bar shall commence upon the date the assignee or lessee receives notice from the Commission finding a violation pursuant to subsection (b). A barred party shall be eligible to continue to receive benefits from Qualifying Transactions in ECIP that are unrelated to the Qualifying Transaction that resulted in the program bar and that were approved prior to the commencement of the program bar.
- (2) A program bar shall also apply to affiliates of barred parties. Third-parties shall be considered affiliates of a barred party if they qualify as an affiliate under § 1.60001. A prospective ECIP participant will be considered a barred affiliate when either: (i) the third-party was identified, or should have been identified, as an affiliate on the initial Commission approved application for the Qualifying Transaction resulting in the bar; or (ii) the third-party identifies, or should have identified, a barred affiliate in a subsequent application to participate in the ECIP, regardless of whether they were affiliates at the time of the filing of the initial application for a Qualifying Transaction resulting in the bar.
- (3) Transactions that include a barred party shall not be eligible for ECIP benefits, even if all other qualifications are satisfied.

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rulemaking (Further Notice)* released in November 2021 in this proceeding.² The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. No comments were filed addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the Final Rules

2. The *Report and Order* adopted by the Commission today establishes the Enhanced Competition Incentive Program (ECIP) for wireless services and modifies the existing partitioning, disaggregation, and leasing rules to provide specific incentives through ECIP for stakeholders to voluntarily participate by engaging in Qualifying Transactions that make spectrum available to these entities and in these areas. The ECIP will facilitate competition-enhancing transactions resulting in increased spectrum access for small carriers and Tribal Nations and increased availability of advanced telecommunications services such as 5G and other advanced wireless services for underserved communities and in rural areas. Moreover, the program represents a productive step towards achieving long-standing Commission goals to close the digital divide and increase spectrum access by small and rural carriers, and builds upon Congressional intent as reflected in the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless (MOBILE NOW) Act⁴ to increase the diversity of spectrum access, increase the availability of advanced telecommunication services to rural areas, and to further facilitate and incentivize transactions that will provide public interest benefits.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. There were no comments filed that specifically addressed the proposed rules and policies presented in the IRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

4. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.⁵

5. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

¹ See 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, (SBREFA) Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² *Partitioning, Disaggregation, and Leasing of Spectrum*, Further Notice of Proposed Rulemaking, WT Docket No. 19-38, 2021 WL 5417404, _ FCC Rcd _ (2021) (*Further Notice* or *FNPRM*).

³ See 5 U.S.C. § 604.

⁴ Consolidated Appropriations Act, Pub. L. No. 115-141, Division P (RAY BAUM'S Act of 2018), Title VI (MOBILE NOW Act), § 601 et seq. (2018), codified at 47 U.S.C. §§ 1501-1512.

⁵ *Id.* § 604 (a)(3).

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

6. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.⁶ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁸ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁹

7. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.¹⁰ First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration’s (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.¹¹ These types of small businesses represent 99.9% of all businesses in the United States, which translates to 32.5 million businesses.¹²

8. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”¹³ The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual electronic filing requirements for small exempt organizations.¹⁴ Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.¹⁵

⁶ *Id.* § 604(a)(4).

⁷ *Id.* § 601(6).

⁸ *Id.* § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁹ 15 U.S.C. § 632.

¹⁰ *See* 5 U.S.C. § 601(3)-(6).

¹¹ *See* SBA, Office of Advocacy, Frequently Asked Questions, “What is a small business?,” <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/11/03093005/Small-Business-FAQ-2021.pdf>. (Nov 2021).

¹² *Id.*

¹³ 5 U.S.C. § 601(4).

¹⁴ The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C § 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number small organizations in this small entity description. *See* Annual Electronic Filing Requirement for Small Exempt Organizations — Form 990-N (e-Postcard), “Who must file,” <https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard>. We note that the IRS data does not provide information on whether a small exempt organization is independently owned and operated or dominant in its field.

¹⁵ *See* Exempt Organizations Business Master File Extract (EO BMF), “CSV Files by Region,” <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-ao-bmf>. The IRS Exempt Organization Business Master File (EO BMF) Extract provides information on all registered tax-

(continued...)

9. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹⁶ U.S. Census Bureau data from the 2017 Census of Governments¹⁷ indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.¹⁸ Of this number there were 36,931 general purpose governments (county¹⁹, municipal and town or township²⁰) with populations of less than 50,000 and 12,040 special purpose governments - independent school districts²¹ with enrollment populations of less than 50,000.²² Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of “small governmental jurisdictions.”²³

10. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves.²⁴ Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and

(Continued from previous page) _____
exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS EO BMF data for Region 1-Northeast Area (76,886), Region 2-Mid-Atlantic and Great Lakes Areas (221,121), and Region 3-Gulf Coast and Pacific Coast Areas (273,702) which includes the continental U.S., Alaska, and Hawaii. This data does not include information for Puerto Rico.

¹⁶ 5 U.S.C. § 601(5).

¹⁷ See 13 U.S.C. § 161. The Census of Governments survey is conducted every five (5) years compiling data for years ending with “2” and “7”. See also Census of Governments, <https://www.census.gov/programs-surveys/cog/about.html>.

¹⁸ See U.S. Census Bureau, 2017 Census of Governments – Organization Table 2. Local Governments by Type and State: 2017 [CG1700ORG02], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. Local governmental jurisdictions are made up of general purpose governments (county, municipal and town or township) and special purpose governments (special districts and independent school districts). See also Table 2. CG1700ORG02 Table Notes_Local Governments by Type and State_2017.

¹⁹ See *id.* at tbl. 5. County Governments by Population-Size Group and State: 2017 [CG1700ORG05]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments.

²⁰ See *id.* at tbl. 6. Subcounty General-Purpose Governments by Population-Size Group and State: 2017 [CG1700ORG06], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000.

²¹ See *id.* at tbl. 10. Elementary and Secondary School Systems by Enrollment-Size Group and State: 2017 [CG1700ORG10], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 12,040 independent school districts with enrollment populations less than 50,000. See also Table 4. Special-Purpose Local Governments by State Census Years 1942 to 2017 [CG1700ORG04], CG1700ORG04 Table Notes_Special Purpose Local Governments by State_Census Years 1942 to 2017.

²² While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category.

²³ This total is derived from the sum of the number of general purpose governments (county, municipal and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments - independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments - Organizations tbl. 5, 6, & 10.

²⁴ See U.S. Census Bureau, 2017 NAICS Definition, “517312 Wireless Telecommunications Carriers (except Satellite),” <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

wireless video services.²⁵ The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees.²⁶ U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year.²⁷ Of that number, 2,837 firms employed fewer than 250 employees.²⁸ Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 797 providers that reported they were engaged in the provision of wireless services.²⁹ Of these providers, the Commission estimates that 715 providers have 1,500 or fewer employees.³⁰ Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

11. The *Report and Order* adopts new or additional reporting, recordkeeping and/or compliance obligations for applicants and licensees that may require small entities to hire attorneys, engineers, consultants, or other professionals in order to comply. While the Commission cannot quantify the cost of compliance with the requirements, we note that, in many instances, the requirements we adopt mirror and align with existing obligations that licensees must currently comply with under our rules. Below we discuss the reporting, recordkeeping, and/or compliance requirements adopted in the *Report and Order*.

12. *ECIP Structure and Application.* The rules adopted today establish ECIP eligibility through participation in a Qualifying Transaction by a covered geographic licensee, as defined in the rules. Applicants seeking to participate in the ECIP file an application for partition or disaggregation, a long-term spectrum lease, or a full assignment that: 1) identifies that the application is being submitted for consideration under the ECIP; 2) identifies the selected transaction prong and includes a demonstration of how the parties have established each of the requirements of the prong; 3) demonstrates that the parties to the transaction are unaffiliated; 3) certifies that parties to the transaction are not barred from the ECIP ; 4) certifies that the license(s) in the application are not subject to the one-time ECIP cap; 5) certifies that parties seek ECIP in good faith and with bona fide intent to meet all program requirements, and 6) certifies no benefits were conferred to the assignee or lessee as consideration, or, if they were, provides a description of such benefits.

13. The rules require that an applicant must establish that it qualifies for one of two types of ECIP Qualifying Transactions: one that focuses on small carriers or Tribal Nations gaining spectrum access to increase competition, regardless of geographic location, or one that involves any interested party that commits to operating in, or providing service to, rural areas. For each prong, applicants must meet a minimum spectrum threshold and a minimum geography threshold.

14. *Operational Requirement.* The rules establish program protections to safeguard against waste, fraud, and abuse. Under these protections, assignees and lessees of transactions pursuant to 47

²⁵ *Id.*

²⁶ See 13 CFR § 121.201, NAICS Code 517312.

²⁷ See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPfirm, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPfirm&hidePreview=false>.

²⁸ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

²⁹ Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/pubId.lic/attachments/DOC-379181A1.pdf>.

³⁰ *Id.*

CFR §1.60003 must file two operational requirement notifications, an initial and a final, related to their compliance with the operational requirement. The Initial Operational Requirement Notification must be filed within 30 days of the commencement of operations complying with the operational requirement, while the Final Operational Requirement Notification must be filed within 30 days of satisfaction of the operational requirement for three consecutive years. Both notifications require the filing of technical network data and a certification of compliance with the requirements.

15. *Reaggregation of Spectrum Licenses.* The rules establish a procedure for reaggregation of multiple licenses which were disaggregated or partitioned and which meet certain other requirements set out in the Commission's rules. Applicants may do so by filing FCC Form 601. Each request must include a compliance attachment certifying that the licenses at issue: 1) are of the same radio service, and have the same market and channel block; 2) have met all performance requirements (both interim and final benchmarks); 2) have been renewed at least once after meeting any relevant continuing service or operational requirements, and 3) have not violated the Commission's permanent discontinuance rules.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

16. The RFA requires an agency to provide, "a description of the steps the agency has taken to minimize the significant economic impact on small entities...including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected."³¹

17. The intent of the MOBILE NOW Act is, in part, to make unused spectrum available to small carriers and increase the provision of wireless services in rural areas. Thus the considerations in the *Report and Order* focus on small and rural carriers as a general matter, and overall on how to successfully engage such carriers in the ECIP. The *Report and Order* establishes the ECIP and related rules to facilitate opportunities for small carriers and Tribal Nations to increase access to spectrum, to increase competition, and to expand wireless deployment in rural areas. ECIP eligibility is established through participation in partitioning, disaggregation, leasing, and full assignment of spectrum based on small carriers or Tribal Nations gaining spectrum access to increase competition, regardless of geographic location under the small carrier or Tribal Nations prong, or participation by any interested party that commits to operating in, or providing service to rural areas under the rural-focused transactions prong. Both assignments and leases (other than spectrum manager leases of 3.5 GHz Priority Access Licenses in the Citizens Band Radio Service) will qualify for ECIP, as long as they satisfy the other program criteria.

18. In addition to the incentive program, the *Report and Order* provides benefits that will ease the regulatory and administrative burdens for participating licensees by providing for reaggregation of previously partitioned and disaggregated licenses up to the original license size, while adopting appropriate safeguards. Other steps we have taken to minimize the economic impact on small entities in this rulemaking include the adoption of minimum compliance requirements, and ECIP application and certification filing requirements that are similar to existing Commission application and certification requirements.

19. *Enhanced Competition Incentive Program Structure.* Under the ECIP eligibility structure, we allow any covered geographic licensee to: 1) offer spectrum to an unaffiliated eligible entity through a partition and/or disaggregation; 2) to offer spectrum to an unaffiliated eligible entity through a long-term leasing arrangement, or 3) to assign its entire authorization to ensure that appropriate incentives and benefits are afforded consistently across a variety of transaction types. Further, in light of the requirement of the MOBILE NOW Act that we assess the administrative feasibility of adopting program features, we determined that it was necessary to modify our proposed approach towards leasing eligibility

³¹ 5 U.S.C. § 604(a)(6).

to ensure that all ECIP participants can accept responsibility for program obligations and realize program benefits. We therefore do not include all WRS licensees in “included services” as eligible lessors, since many of the program obligations and benefits are inapplicable to site-based wireless licensees that are generally permitted to lease, but we do permit any covered geographic licensees in “included services” to participate as lessors in the ECIP program.

20. *Small Carrier or Tribal Nations Prong.* We specifically adopted a definition of Qualifying Transaction that focused on small carriers and Tribal Nations and provided incentives to benefit small and other licensees as part of the ECIP. These incentives included a five-year license term extension for all parties involved in a qualifying partition/disaggregation transaction, and for all lessors entering into a qualifying spectrum leasing transaction. The reduction in the frequency of license renewal obligations will reduce regulatory burdens on small carriers and other licensees. In order to increase the flexibility of the program, we also adopted rules to permit full assignments of covered geographic licenses to be an eligible type of ECIP transaction.

21. *Minimum Thresholds.* The minimum spectrum thresholds for this prong, established to increase flexibility, require the inclusion of a percentage of licensed spectrum, rather than mandate a specific amount of spectrum in megahertz that must be included in a transaction. We declined to adopt the spectrum total approach, opting for the percentage approach as technology neutral and flexible, in order to allow a wide range of small and other licensees to participate in and benefit from the ECIP. Our technology-neutral and flexible approach allows small entities to make choices based on their individual economic circumstances. We also adopted a minimum geography threshold for Qualifying Transactions with a two-tiered geographic scaling based on based on the amount of square mileage within the licensed area of the assignor or lessor, regardless of the license type.³² This rule will ensure fair and consistent application, as it will allow small carriers or Tribal Nations to use geography from any type or size of licensed area, whether rural or urban, so long as it meets the minimum threshold. The Commission believes the approach we adopted appropriately balances the goal of ensuring greater program participation, particularly for licensees in large geographic areas, while protecting against potential abuse through transactions involving *de minimis* geography entered into for the singular purpose of receiving benefits.

22. *Rural-Focused Transactions Prong.* The rules also provide a second path for ECIP participation for small and other entities, which expanded the class of eligible participants to any licensee that meets the requirements of a rural-focused transactions prong. This option will provide opportunities for small entities and was unanimously supported by commenters.

23. *Minimum Thresholds.* Similar to the small carrier/Tribal Nations prong, the rules establish minimum spectrum thresholds for the rural-focused transaction prong using a percentage threshold rather than a specific amount of spectrum in order to allow a wide range of small entities and other licensees to participate in and benefit from the ECIP. Likewise, the *Report and Order* adopted a more neutral approach than proposed in the *Further Notice* in order to provide equity across market types, and adopted a Qualifying Geography threshold based on actual geographic license size in square miles in order to ensure equal treatment for all licensees, included small entities, across similar size markets.

24. In our adoption of the statutory definition of “rural area,” we considered the concerns of commenters about the application of the terms contiguous and adjacent in the statutory definition, and their recommendation to adopt a bright line rule to prevent less populated edges of urban areas from being excluded.³³ The Commission declined to adopt this alternative approach, noting that the MOBILE NOW Act did not provide an exception for the inclusion in the definition of “rural” those areas that are arguably less populated, but nonetheless are part of an urbanized area contiguous or adjacent to a city or town with

³² We considered but declined to adopt WISPA’s proposed geography threshold based on license areas (e.g., CMAs/PEAs vs. county-based license areas). See WISPA Comments at 6.

³³ UTC Reply Comments at 6, WISPA Comments at 7, RWA Reply Comments at 3.

a population of more than 50,000. We also declined to adopt an alternative proposal from WISPA for a minimum qualifying geography of 200 square miles, as it did not explain how its proposal would meet program goals in the public interest.

25. *Program Benefits.* The final rules establish three ECIP incentives: a five-year license term extension, a one year construction extension, and alternative construction requirements for rural-focused transactions. These incentives are available to a wide variety of WRS licensees, and will benefit small licensees. The five year license term extension was supported by most commenters as a positive shift in the transaction costs making secondary-market transactions more worthwhile to participants, and effectively incentivizing those transactions.³⁴ The Commission believes that this license term extension benefit offers an incentive, consistent with Congressional direction, to licensees that have yet to meet their construction obligations as well as to those that may not have maintained the required level of service throughout the course of their license term. Commenters supported the construction extension ECIP benefit³⁵ although several commenters offered alternative proposals including a two-year extension or a non-population-based performance requirement;³⁶ extension time frames based on the geography covered,³⁷ and extending the deadlines by two years if the lease, partition, disaggregation, or full license transaction is reached within 12 months of the incumbent licensee's build-out deadline to incentivize transactions and allow assignees sufficient time to meet construction deadlines.³⁸ We were not persuaded from the record, however, that additional time beyond a one-year construction extension is warranted as an ECIP benefit and therefore declined to adopt any of these alternatives.

26. The alternative construction requirements for rural-focused transaction raised concerns for commenters regarding the 100% coverage requirement of the Qualifying Geography involved in the rural-focused transaction prong, who argued that the alternative does not strike the correct balance and does not provide flexibility.³⁹ Based on our review of the record, we believe that commenters' views on this issue are misplaced because the commenters interpret our proposal to required 100% coverage of all geography included in the overall transaction, regardless of size. We reiterate that although we require 100% coverage of Qualifying Geography, parties to an ECIP transaction are free to include significantly more geography than the minimum square mileage of Qualifying Geography required to be constructed. We believe that have adopted a flexible approach that will facilitate rural-focused transactions and ensure reasonable stakeholder investment in rural buildout sufficient to warrant ECIP benefits.

27. *Protections Against Waste, Fraud, and Abuse.* The Commission adopted several measures to protect the ECIP program from waste, fraud, and abuse and promote its goals of increased spectrum access to small entities, increased rural service, and increased competition. The protective measures adopted in the *Report and Order* include a requirement that applicants seeking to participate in ECIP can select either the small carrier or Tribal Nation prong or the rural-focused transaction prong, but not both, for each ECIP transaction, and do not have the option of changing prongs once their selection has been made. The rules also impose a five-year holding period on licenses assigned through partitioning and/or disaggregation from an ECIP transaction, and a five-year minimum term for leasing arrangements; an operational requirement of 100% coverage of the Qualifying Geography for three consecutive years for rural-focused transactions; automatic termination of the relevant ECIP license and bar from future program participation for a licensee's failure to comply with the five-year holding period, or to meet the applicable buildout and operational requirements (as required for rural-focused

³⁴ RWA Comments at 10, WISPA Comments at 9, UTC Reply Comments at 7.

³⁵ RWA Comments at 12, WISPA Comments at 9, UTC Reply Comments at 7.

³⁶ WISPA Comments at 9.

³⁷ RWA Comments at 5.

³⁸ UTC Reply Comments at 8.

³⁹ RWA Comments at 12, T-Mobile Comments at 7.

transactions); and a one-time cap on ECIP benefits for each license subject to a Qualifying Transaction (e.g., the original license and the subsequent license(s) issued from a partition and/or disaggregation).

28. In our consideration of the protective measures we adopted, we took steps to minimize the impact for small entities. For example, for the requirement that an applicant seeking participation in the ECIP can select only one prong, we considered the costs and benefits and determined the most efficient approach was a requirement that provides a clear and distinct path to ECIP participation by mandating that applicants make a prong selection. We require parties to an ECIP transaction to make a prong selection using existing FCC Form 603 for partitions and/or disaggregation or FCC Form 608 for leases rather than creating new forms for ECIP transactions. Our approach avoids increasing the administrative costs on small entities that would be required to become familiar with and complete new forms, while also providing a consistent application of program benefits, ensuring program integrity by requiring applicants to follow through with their stated commitment to provide certain public interest benefits, and reducing the potential for gamesmanship in ECIP.

29. Subject to certain limited exceptions, we established a five-year holding period or minimum lease term on licenses stemming from ECIP transactions, as well as prohibited the leasing or subleasing of spectrum by ECIP assignees and lessees during the five-year restrictive period. While we considered that the restrictions may not directly align with parties' immediate business needs in all cases, we believed that this approach, on balance, best promotes the goals of the program, effectively deters unwanted behavior, and serves the public interest. We declined to create an exception for licensees exiting the wireless business,⁴⁰ or for lessees that prematurely terminate their lease due to an involuntary transaction,⁴¹ finding them impractical and unnecessary, respectively, but stated that we would entertain waiver requests in this situations, if they arise, which will help minimize any potential economic impact for small entities under these circumstances.

30. Recognizing the realities and challenges of today's ever-growing wireless market, we have consistently taken an approach that provides wireless radio service licensees flexibility to foster competition. Accordingly, we adopted an exception to the holding period restrictions for *pro forma* transactions which will allow small entities and other WRS licensees to execute a change in ownership structure or a reorganization without regulatory delay and impeding their ability to compete. We also carve out an exception for lease arrangements, including subleases involving providers of Contraband Interdiction Systems (CIS) that deploy systems to prevent contraband device use in correctional facilities, given the operating parameters and public safety importance of such systems.

31. For any Commission program that confers a benefit and is intended to achieve results that serve the public interest, we find it imperative to have adequate protections in place to avoid potential of waste, fraud, and abuse at the outset, rather than resorting to later Commission enforcement actions to address compliance or malfeasance, as preferred by some commenters.⁴² We note that some of the protections we adopted in the *Report and Order* were specifically included in the MOBILE NOW Act and have been implemented by the Commission in the past to guard against anti-competitive behavior and abuse of Commission process.⁴³ We believe we have adopted a balanced approach and declined to adopt alternative approaches raised by commenters aimed at softening the penalties for an assignor/lessor when the assignee/lessee fails to fulfill its ECIP obligation.

⁴⁰ RWA Comments at 15.

⁴¹ *Id.*

⁴² See, e.g., ITIF Comments at 4 ("Five-year holding periods or lease terms would inject sclerosis into a system that should be tuned for dynamism"); NTCA Reply at 5 (opposing automatic termination).

⁴³ See, e.g., MOBILE NOW Act § 616 (stating that automatic license termination is the consequence of failure to buildout); 47 CFR § 20.22 (requiring a holding period for 600 MHz reserve licenses); 47 CFR § 1.946 (automatic termination for failure to build-out wireless licenses in certain radio services).

32. *Operational Requirements for Rural-Focused Transactions.* In light of the benefits afforded to participating licensees through ECIP, the Commission sought comment in the *Further Notice* on the costs and benefits associated with standardizing operational requirements for the ECIP. The public interest will be served by having a targeted measure to ensure that operation or the provision of service by participating licensees occurs throughout the entire Qualifying Geography for a sustained period. Therefore, we adopted an operational requirement that an assignee or lessee of any ECIP rural-focused transaction must operate or provide service throughout the entire Qualifying Geography for a minimum of three consecutive years, within the five-year holding period or lease term as applicable, and must certify that it has provided service in accordance with the applicable operational requirement. The rules contain operational requirements for coverage, but recognize that, given the differing regulation of assignees and lessees, also contain modified rules regarding the date by which operation or service must commence in order to provide a clear and appropriate approach to each type of licensee. The rules require two notification filings for rural-focused prong ECIP transactions: 1) an Initial Operational Requirement Notification, and 2) a Final Operational Requirement Notification. These rules also specify that certain technical information and data must be included. While these rules imposed new requirements on all licensees, including small entities, we find that both are necessary to effectuate ECIP goals, and no party opposed the operational requirement or the proposed parameters for the requirement.

33. *Prohibition on Bad-Faith Transactions.* In order to protect against misuse of the program, we required two new certifications to be included in the assignment and/or lease applications (FCC Forms 603 and 608, respectively). These certifications apply to all participants, and impose a minimal burden on applicants. To prevent bad faith transactions that bring no public benefits in return for ECIP benefits, we decline to penalize the assignor or lessor when the assignee or lessee is solely at fault for failing to adhere to the holding period, construction requirement, or operational requirement (for rural-focused transactions). We recognize that the assignee/lessee is a separate, independent entity and that the assignor/lessor is not typically a guarantor of assignee/lessee performance, therefore penalties should be applied to the parties involved, including the violator and its affiliates. Additionally, we are aware that program participation may be hindered if we impose penalties on an assignor/lessor for the shortcomings of the assignee/lessee that were beyond its control, and would have an adverse economic impact on assignees/lessees which would likely be disproportionate for small entities. To the extent the assignor/lessor is found to have entered into a sham transaction to reap program benefits, whereby it knew or should have known the assignee/lessee could or would not meet program obligations however, we will bar the entity and its affiliates from future participation in ECIP and may impose monetary penalties. We concluded the requirement and related certifications will foster competition and facilitate service to rural areas by balancing program incentives with appropriate protective measures that will not unduly hinder program effectiveness.

34. *Automatic License Termination and Future ECIP Participation Bar.* The Commission considered the alternative positions of commenters on this issue,⁴⁴ but determined that automatic license termination and a bar on future program participation are necessary and appropriate measures to deter program waste, fraud, and abuse, given the substantial benefits being offered to ECIP participants. Our past experience administering wireless licenses and programs that provide benefits in furtherance of the public interest led us to conclude that these two penalties are appropriate measures to incentivize program participants to fulfill their core program requirements. Indeed, the automatic termination provision is consistent with section 616 of the MOBILE NOW Act, which provides that “the right to the spectrum shall be forfeited” if a party “fails to meet any build out requirements set by the Commission.”⁴⁵ Further, we adopted these penalties to impress upon program participants the importance of meeting the obligations associated with receiving ECIP benefits and the general need for program compliance to ensure the ECIP program operates effectively.

⁴⁴ NCTA Reply Comments at 5; RWA Comments at 17-18; RWA Reply at 7.

⁴⁵ See MOBILE NOW Act § 616.

35. *Reaggregation of Spectrum Licenses.* The *Report and Order* adopted final rules to permit license reaggregation up to the original geographic size and spectrum band(s) for the type of license. There was broad support from commenters, in particular support for allowing but not requiring licenses to be reaggregated up to the original geographic size and spectrum band(s) for the type of license being reaggregated.⁴⁶ The Commission considered the alternative positions of WISPA but agreed with the majority of commenters that allowing reaggregation creates a “certainty that a license holder could re-aggregate partitioned or disaggregated licenses in the future” which “would eliminate a potential reason not to partition or disaggregate in the first instance.”⁴⁷ Moreover, we were not persuaded by WISPA’s arguments for not permitting reaggregation, or for requiring a holding period before further assignment of reaggregated spectrum.⁴⁸ Adopting a formal process for license reaggregation will ease the regulatory and administrative burden on small and other licensees and on Commission staff, as well as increase licensee flexibility. Indeed, the reaggregation may incentivize, not undermine, secondary market transactions consistent with the purposes of the ECIP and the goals of the MOBILE NOW Act. Furthermore, the substantial benefit of establishing a formal process for license reaggregation, coupled with the safeguards to qualify for reaggregation, as well as specific protections against waste, fraud and abuse built into the ECIP, renders a five-year holding period advocated by WISPA unnecessary. Applicants seeking license reaggregation must submit an application requesting a major modification pursuant to Commission rule 1.929,⁴⁹ as well as an attachment certifying compliance with three safeguards. These filing requirements apply to all licensees, including small entities, but are warranted as they will ensure that licensees seeking to reaggregate licenses are not doing so merely to avoid complying with the regulatory requirements (e.g. meeting performance benchmarks) associated with each license to be reaggregated.

G. Report to Congress

36. The Commission will send a copy of the *Report and Order and Second Further Notice of Proposed Rulemaking*, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.⁵⁰ In addition, the Commission will send a copy of the *Report and Order and Second Further Notice of Proposed Rulemaking*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order and Second Further Notice of Proposed Rulemaking*, and FRFA (or summaries thereof) will also be published in the Federal Register.⁵¹

⁴⁶ CTIA Comments at 3-4; Mavenir Comments at 2-3; RWA Comments at 21; T-Mobile Comments at 1-4.

⁴⁷ T-Mobile Comments at 2 (quoting *FNPRM* at 20-21, para. 59); *see also* CTIA Reply Comments at 3; Mavenir Comments at 2.

⁴⁸ WISPA Reply Comments at 8; WISPA Comments at 11.

⁴⁹ 47 CFR § 1.929.

⁵⁰ *See* 5 U.S.C. § 801(a)(1)(A).

⁵¹ *See* 5 U.S.C. § 604(b).

APPENDIX C

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Report and Order and Second Further Notice of Proposed Rulemaking (Second Further Notice)*. Written comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Report and Order and Second Further Notice*. The Commission will send a copy of the *Second Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the *Report and Order and Second Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. In today's *Second Further Notice*, the Commission seeks comment on whether potential future expansion of the program could further the Congressional goals set out in the MOBILE NOW Act, and on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority. It also proposes and seeks comment on a framework for creating alternatives to population-based performance requirements for a variety of wireless radio service stakeholders with communications needs and for business models not specifically targeted towards providing commercial wireless service to subscribers. The Commission seeks comment on a variety of alternatives to develop a robust record on the most efficient approach towards addressing this industry need. The *Second Further Notice* also seeks comment on a "use or offer to share" safe harbor metric for renewal and construction that would allow a licensee to meet a renewal safe harbor where the licensee would show that 1) it is using the spectrum in order to meet a private internal need within the licensed area, and 2) it has an ongoing public offering to sell or lease any unused geographic area under reasonable terms and conditions.

3. In the *Further Notice*, the Commission sought comment on a range of issues related to facilitating increased spectrum access and increased availability of telecommunications service in rural areas, noting that commenters generally were supportive of possible benefits of modified construction requirements.⁴ The *Further Notice* also sought more detailed input on providing all WRS flexible use licensees an alternative to population-based requirements.⁵ Commenters generally supported adoption of alternate requirements that were flexible and tailored to the unique needs and challenges of the applicable geographic area or entity,⁶ but advanced limited specific proposals beyond advocating a metric of less than 100 percent coverage. Commenters also put forward various general safe-harbor proposals, but none that provided more certainty or objectivity than the "substantial service" standard.⁷ This *Second Further Notice* thus proposes a framework and seeks further specific comment on details and potential real-world

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ *FNPRM* at 17-19, sec. III.D.

⁵ *Id.*

⁶ See CTIA Comments at 2, 10-12; EWA Comments at 4; NWCC Comments at 2-3; T-Mobile Comments at 8; USCC Comments at 2-3; UTC Comments at 9-10; WISPA Comments at ii, 9-10, 12-13.

⁷ See, e.g., EWA Comments at 4-5 (advocating subjective "productive use" standard); T-Mobile Comments at 8 (supporting a safe harbor but without offering definitions); Mavenir Comments at 5-6 (supporting ORAN safe harbor only).

application of alternative performance requirements and a safe harbor and appropriate metrics that will balance the industry's desire for certainty while not resulting in spectrum lying fallow.

4. In response to the *Further Notice*, WISPA proposed two specific metrics for determining the scope of expansion of eligible entities in the ECIP, including whether an entity: 1) has filed an FCC Form 477⁸ for census blocks that overlap or are adjacent to the license area to be disaggregated, partitioned or leased for at least the two calendar years preceding the transaction; and 2) together with its controlling interests, affiliates, and the affiliates of its controlling interests, has fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers.⁹ In considering eligibility expansion, we seek comment on two threshold issues: (1) how to define the specific category of eligible non-common carriers; and (2) what objective measure to determine relative small size is appropriate in this context. The *Second Further Notice* seeks comment on these metrics and whether they strike the appropriate balance in the potential range of expansion, including how these limitations relate to the goals of the program.

B. Legal Basis

5. The proposed action is authorized pursuant to sections 1, 4(i), 303, and 310(d) of the Communications Act of 1934, as amended, and section 616 of the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act, 47 U.S.C. §§ 151, 154(i), 303, 310(d), 1506

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

6. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposals discussed herein, if adopted.¹⁰ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹¹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹² A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹³

⁸ FCC Form 477 collects information about broadband connections to end-user locations, wired and wireless local telephone services, and interconnected Voice over Internet Protocol (VoIP) services. We note that the Commission has established a new Broadband Data Collection (BDC), and that all facilities-based providers of fixed and mobile broadband internet access service must submit broadband availability data through the Broadband Data Collection no later than September 1, 2022 for the initial filing and bi-annually thereafter. *See Broadband Data Task Force and Office of Economics and Analytics Announce Inaugural Broadband Data Collection Filing Dates*, WC Docket Nos. 19-195, 11-10, Public Notice, DA 22-182, at 9, para. 22 (OEA Feb. 22, 2022). As a result of the BDC, the Commission has contemplated sunsetting the fixed broadband deployment aspect of FCC Form 477. *See Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program*, WC Docket Nos. 19-195, 11-10, Third Report and Order, 36 FCC Rcd 1126, 1188-1189, paras. 159-160 (2021).

⁹ WISPA *Notice* Comments at 6; reiterated in WISPA Comments at 5.

¹⁰ 5 U.S.C. § 603(b)(3).

¹¹ *Id.* § 601(6).

¹² *Id.* § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

¹³ 15 U.S.C. § 632.

7. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.¹⁴ First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.¹⁵ These types of small businesses represent 99.9% of all businesses in the United States, which translates to 32.5 million businesses.¹⁶

8. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."¹⁷ The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual electronic filing requirements for small exempt organizations.¹⁸ Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.¹⁹

9. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."²⁰ U.S. Census Bureau data from the 2017 Census of Governments²¹ indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.²² Of this number there were

¹⁴ See 5 U.S.C. § 601(3)-(6).

¹⁵ See SBA, Office of Advocacy, Frequently Asked Questions, "What is a small business?," <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/11/03093005/Small-Business-FAQ-2021.pdf>. (Nov 2021).

¹⁶ *Id.*

¹⁷ 5 U.S.C. § 601(4).

¹⁸ The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C § 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number small organizations in this small entity description. See Annual Electronic Filing Requirement for Small Exempt Organizations — Form 990-N (e-Postcard), "Who must file,"

<https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard>. We note that the IRS data does not provide information on whether a small exempt organization is independently owned and operated or dominant in its field.

¹⁹ See Exempt Organizations Business Master File Extract (EO BMF), "CSV Files by Region," <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-EO-BMF>. The IRS Exempt Organization Business Master File (EO BMF) Extract provides information on all registered tax-exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS EO BMF data for Region 1-Northeast Area (76,886), Region 2-Mid-Atlantic and Great Lakes Areas (221,121), and Region 3-Gulf Coast and Pacific Coast Areas (273,702) which includes the continental U.S., Alaska, and Hawaii. This data does not include information for Puerto Rico.

²⁰ 5 U.S.C. § 601(5).

²¹ See 13 U.S.C. § 161. The Census of Governments survey is conducted every five (5) years compiling data for years ending with "2" and "7". See also Census of Governments, <https://www.census.gov/programs-surveys/cog/about.html>.

²² See U.S. Census Bureau, 2017 Census of Governments – Organization Table 2. Local Governments by Type and State: 2017 [CG1700ORG02], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. Local governmental jurisdictions are made up of general purpose governments (county, municipal and town or township) and special purpose governments (special districts and independent school districts). See also Table 2. CG1700ORG02 Table Notes_Local Governments by Type and State_2017.

36,931 general purpose governments (county²³, municipal and town or township²⁴) with populations of less than 50,000 and 12,040 special purpose governments - independent school districts²⁵ with enrollment populations of less than 50,000.²⁶ Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of “small governmental jurisdictions.”²⁷

10. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves.²⁸ Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services.²⁹ The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees.³⁰ U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year.³¹ Of that number, 2,837 firms employed fewer than 250 employees.³² Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 797 providers that reported they were engaged in the provision of wireless services.³³ Of these providers, the Commission estimates that 715 providers have 1,500 or fewer employees.³⁴ Consequently, using the SBA’s small business size standard, most of these providers can be

²³ See *id.* at tbl. 5. County Governments by Population-Size Group and State: 2017 [CG1700ORG05]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments.

²⁴ See *id.* at tbl. 6. Subcounty General-Purpose Governments by Population-Size Group and State: 2017 [CG1700ORG06], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000.

²⁵ See *id.* at tbl. 10. Elementary and Secondary School Systems by Enrollment-Size Group and State: 2017 [CG1700ORG10], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 12,040 independent school districts with enrollment populations less than 50,000. See also Table 4. Special-Purpose Local Governments by State Census Years 1942 to 2017 [CG1700ORG04], CG1700ORG04 Table Notes_Special Purpose Local Governments by State_Census Years 1942 to 2017.

²⁶ While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category.

²⁷ This total is derived from the sum of the number of general purpose governments (county, municipal and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments - independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments - Organizations tbl. 5, 6, & 10.

²⁸ See U.S. Census Bureau, *2017 NAICS Definition, “517312 Wireless Telecommunications Carriers (except Satellite),”* <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

²⁹ *Id.*

³⁰ See 13 CFR § 121.201, NAICS Code 517312.

³¹ See U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFIEM, NAICS Code 517312, <https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIEM&hidePrevious=false>.

³² *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

³³ Federal-State Joint Board on Universal Service, Universal Service Monitoring Report at 26, Table 1.12 (2021), <https://docs.fcc.gov/pub/Id.lic/attachments/DOC-379181A1.pdf>.

³⁴ *Id.*

considered small entities.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

11. In the *Second Further Notice*, the Commission seeks comment on whether to expand eligibility under the small carrier or Tribal Nation transaction prong of the ECIP to other entities, and proposes and seeks comment on a framework for creating alternatives to population-based performance requirements for a variety of wireless radio service stakeholders with communications needs, including a potential safe harbor. The proposed framework and requirements upon which we seek comment, if adopted, may impose new and/or additional reporting, recordkeeping and other compliance requirements on small entities as well as other licensees to allow those licensees seeking to provide service to meet private communications needs. Our proposal to have a demand-based construction alternative requirement for private networks includes the proposed requirement that a licensee would have to establish and show that its licensed area is entirely covered through the sum of the following three zones: a core usage zone, an expansion zone, and a protection zone.

12. The *Second Further Notice* seeks comments on how to set the appropriate metrics or requirements to define these zones, what usage deadlines the Commission should establish, if any, what documentation licensees would need to prepare to make these showings to the Commission, and whether the Commission should consider additional technical rule changes to protect against harmful interference. We also inquire whether having licensees provide maps and engineering showings to confirm where spectrum is being used is sufficient, or whether other methods should be used to identify use areas when licensees make certifications to the Commission, and inquire whether there should be additional certifications, notices, or deadlines for the usage of a defined expansion area.

13. The *Second Further Notice* also seeks comment on a “use or offer to share” safe harbor metric for renewal and construction where the licensee would be required show: 1) it is using the spectrum in order to meet a private internal need within the licensed area, and 2) it has an ongoing public offering to sell or lease any unused geographic area under reasonable terms and conditions. The *Second Further Notice* seeks comment on definitions of the relevant terms and concepts within the proposed safe harbor, and additional ways to avoid spectrum warehousing and abuse. These matters could result in reporting, recordkeeping and other compliance requirements for small entities as well as other licensees. Further, small entities and other licensees may have to provide maps and engineering specifications when making certifications to the Commission on spectrum utilization; may be allowed to provide a certification that they do not need to define an expansion zone into which the usage area may extend based on network plans, and may be subject to additional certification and notice filing requirements.

14. In assessing the cost of compliance for small entities, at this time the Commission is not in a position to determine whether, if adopted, the proposals and matters upon which we seek comment in the *Second Further Notice* will require small entities to hire professionals to comply, and cannot quantify the cost of compliance with any of the potential rule changes that may be adopted. To help the Commission more fully evaluate the cost of compliance should our proposed framework and the other matters upon which we seek comment be adopted, in the *Second Further Notice* we request comments on the cost implications and benefits of the proposals and alternatives discussed above as well as on any alternative approaches that are submitted by commenters. We expect the information we receive in comments, including cost and benefit data, will help the Commission further identify and evaluate relevant matters for small entities, including compliance costs and other burdens that may result from the proposals and inquiries we make in the *Second Further Notice*.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

15. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting

requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof for such small entities.”³⁵

16. The *Second Further Notice* considers a demand-based construction requirement as an alternative to a population-based construction metric and seeks comment on modifying the existing renewal safe harbor to include demand-based initial construction. Specifically, the Commission invites comment on a three-part framework proposal requiring carriers to define a core usage zone, a reasonable expansion zone, and a protection zone. For the core usage zone where all the spectrum is actively used to meet private, internal communications needs, we do not propose a standard minimum or maximum size for this area, consistent with our goal to allow each entity to define the usage area tailored to its core needs, which will minimize the economic impact for small entities. In our assessment of how to delineate the appropriate size of a core area in order to guard against inefficient spectrum use or warehousing, we consider whether the core area should be a set minimum percentage of the overall area, or whether there are other minimum metrics that could be adopted to achieve this goal. Similarly, in our discussion of whether to adopt minimum signal level or other requirements to define this area, we inquire whether there are other minimum requirements that we should impose to delineate the core area of operations. We also inquire whether providing maps and engineering showings is the best approach for licensees to confirm where spectrum is being utilized or, in the alternative, whether licensees should define this area in another way when making a certification to the Commission. For both the core and expansion zones, we consider whether or not to establish deadlines for licensees to meet their usage obligations in these zones, and whether or not to require licensees to complete expansion in a certain period of time.

17. Another step, if adopted, that may minimize any significant economic impact for small entities, is the Commission's continued approach to provide licensees flexibility to define a reasonable protection zone surrounding the core usage and expansion zones, up to the license boundary, in order to provide interference protection for the licensee and neighboring licensees. This approach would allow licensees to place transmitters according to business needs, and not have to provide commercial-grade signal coverage at the very edge of their license boundary, which is the same flexibility provided today in radio services that only require coverage of a population percentage. To further understand the economic impact for small entities, for the alternatives, the Commission requests comments regarding input on a range of necessary costs—e.g., hardware, software, network integration, engineering, ongoing maintenance—and the costs associated with determining and deploying these usage zones. Through these comments, the Commission seeks to develop final rules that provide certainty to industry and meet Commission goals of ensuring efficient use of spectrum and safeguarding against spectrum warehousing, while also minimizing economic and other compliance burdens on small and other entities to the greatest extent possible.

18. Finally, in order to clarify and simplify compliance and reporting requirements for impacted small and other entities, the *Second Further Notice* invites comment regarding the prospective needs of small and other entities and the various approaches that can be taken to accommodate those needs. The Commission expects to consider more fully the economic impact on small entities following its review of comments filed in response to the *Second Further Notice*, including any costs and benefits analyses, and alternative proposals. The Commission's evaluation of the comments filed in this proceeding will shape the final alternatives it considers, the final conclusions it reaches, and the actions it ultimately takes in this proceeding to minimize any significant economic impact that may occur on small entities as a result of any final rules that are adopted.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

19. None.

³⁵ 5 U.S.C. § 603(c)(1)-(4).

APPENDIX D**List of Commenters****Comments**

AST SpaceMobile, Inc.
CTIA
Enterprise Wireless Alliance
Information Technology and Innovation Foundation
Mavenir Systems, Inc.
OptimEra, Inc.
Open Technology Institute at New America and Public Knowledge
Rural Wireless Association, Inc.
Satellite Industry Association
T-Mobile USA, Inc.
Wireless Internet Service Providers Association

Reply Comments

AT&T Services, Inc.
CTIA
Hughes Network Systems, LLC
National Wireless Communications Council
NCTA – The Internet and Television Association
NTCA – The Rural Broadband Association
Rural Wireless Association, Inc.
United States Cellular Corporation
Utilities Technology Council
Wireless Internet Service Providers Association